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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August 31, 1977

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OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, after rehearing en banc, reversing the determination of a three-judge panel of the Court of Appeals and affirming an order of the United States District Court for the Southern District of New York. The Court below circumvented and undercut this

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[1] Petitioners, all of whom are named defendants in this consolidated action, are two corporations (Oppenheimer Fund, Inc. and Oppenheimer Management Corp.), one partnership (Oppenheimer & Co.) and four individuals (Leon Levy, Jack Nash, Edmund T. Delaney and Emanuel Celler).

Court's decision in *Eisen IV*[2] by applying the discovery provisions of Fed. Rule Civ. Proc. 34 to impose on petitioner Oppenheimer Fund, Inc., a nominal and financially disinterested party in the class action portion of the complaints, the substantial expense of creating special computer programs to prepare a list of the names and addresses of prospective class members for the sole purpose of enabling respondents to send the initial class action notices required by Fed. Rule Civ. Proc. 23(c)(2), even though petitioners had made the existing computerized business records fully available to respondents.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 20 F.R. Serv. 2d 1218 and appears in Appendix A.

The memorandum order of the District Court entered on reargument of its opinion is unreported and appears in Appendix B.

The opinion of the three-judge panel of the Court of Appeals is reported at 21 F.R. Serv. 2d 1213 and appears in Appendix C.

The subsequent opinion of the Court of Appeals on rehearing en banc is not yet reported and appears in Appendix E.

Jurisdiction of the Court

The judgment of the en banc panel of the Court of Appeals was entered on June 22, 1977. (App. E, p. 34a.)

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[2] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), *vacating*, 479 F.2d 1005 (2d Cir. 1973) (*"Eisen III"*).

The order of the Court of Appeals granting respondents' petition for rehearing en banc was entered on September 14, 1976. (App. D, p. 32a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether, in a class action maintained under Fed. Rule Civ. Proc. 23(b)(3), any of the defendants can be required to bear the substantial expense of identifying and assembling the names and addresses of class members for the purpose of relieving plaintiffs of that obligation incident to sending the initial class action notice required by Fed. Rule Civ. Proc. 23(c)(2).

Statutes and Rules Involved

The following rules are involved in the determination of this case, and are set forth in full text in Appendix F:

Fed. Rule Civ. Proc. 23(a), 28 U.S.C.
Fed. Rule Civ. Proc. 23(b)(3), 28 U.S.C.
Fed. Rule Civ. Proc. 23(c)(1), 28 U.S.C.
Fed. Rule Civ. Proc. 23(c)(2), 28 U.S.C.
Fed. Rule Civ. Proc. 23(d), 28 U.S.C.
Fed. Rule Civ. Proc. 26(b), 28 U.S.C.
Fed. Rule Civ. Proc. 26(c), 28 U.S.C.
Fed. Rule Civ. Proc. 33(c), 28 U.S.C.
Fed. Rule Civ. Proc. 34, 28 U.S.C.

Statement of the Case

Respondents[3] ("plaintiffs") seek to maintain this consolidated action on behalf of a class of 121,000 current and former shareholders[4] of Oppenheimer Fund, Inc. (the "Fund") who acquired its shares between March 28, 1968 and April 24, 1970. Petitioners ("defendants") are the Fund, an open-end investment company registered under the Investment Company Act of 1940, 15 U.S.C. §80a-1 *et seq.;* Oppenheimer Management Corporation (the "Manager"), the investment adviser to the Fund; Oppenheimer & Co., a New York Stock Exchange member firm which owned all of the voting stock of the Manager; and individual directors of the Fund, some of whom were also principals in Oppenheimer & Co. or the Manager.

The complaints, which also contain derivative claims not here relevant, allege violations of Sections 12(2) and 17 of the Securities Act of 1933, 15 U.S.C. §§77*l*(2) and 77q; Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b); Rule 10b-5, promulgated by the Securities and Exchange Commission, 17 C.F.R. §240.10b-5; Sections 22, 30 and 37 of the Investment Company Act of 1940, 15 U.S.C. §§80a-22, 80a-29 and 80a-36; Rules promulgated thereunder by the Securities and Exchange Commission; and fiduciary obligations under state law.[5]

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[3] Additional respondents, all of whom are named as defendants in this consolidated action, are Murray Graham, Eric Hauser, Joseph M. McDaniel, Jr. and Sidney M. Robbins. These individuals have not answered the complaints nor have they otherwise appeared in this action.

[4] Said 121,000 current and former shareholders consist of those who have a direct beneficial interest in Fund shares and those who, through a unit investment trust, have an indirect beneficial interest.

[5] The complaints posit federal jurisdiction upon the claims asserted under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act and the principles of pendent jurisdiction.

The gravamen of plaintiffs' claims is that the defendants caused the Fund to overvalue "restricted" securities in its portfolio during the relevant period, thereby inflating the price of the Fund shares sold to the public, with a consequent alleged failure to meet disclosure requirements. Plaintiffs seek to recover damages equal to the alleged overpayments from all the defendants except the Fund, which appears to have been named as a defendant only for the purposes of the derivative claims. In their amended answers, defendants deny the material allegations of the plaintiffs' complaints and assert various affirmative defenses.

On March 30, 1973, almost four years after the complaints were filed, the four plaintiffs[6] moved for an order pursuant to Fed. Rule Civ. Proc. 23(c)(1) (hereinafter cited as "Rule . . . .") for class determination on behalf of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. During examination of the Fund's transfer agent concerning procedures and costs of determining the names and addresses of the members of the prospective class as well as other matters relating to the initial class notice required by Rule 23(c)(2), it was established that the names and addresses of current and former shareholders of the Fund, including members of the class, are maintained on magnetic computer tapes in the possession of the transfer agent.[7] However, there are continual purchases and redemptions of Fund shares, and many purchasers who acquired shares during the relevant period, April 1968 through April 1970, have redeemed their shares and are not current shareholders. Conversely, many current shareholders did not make any purchases during the relevant period.

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[6] As of March 31, 1973, 67,726,541 shares of the Fund were outstanding, owned by a total of 173,000 shareholders. As of the commencement of this action, plaintiffs Shaev, plaintiff Sanders and plaintiff Taussig owned an aggregate of slightly over 2,600 shares, consisting of 45.071, 209.823 and 2,369.363 shares, respectively. Plaintiff Taussig redeemed 337.39 shares during the relevant period.

[7] The en banc panel of the Court of Appeals observed that, "in the absence of computer technology, operations so vast and complex as those of the [F]und might well be impossible to conduct." (App. E, p. 37a.) When the motion for class determination was

As a consequence, the class members cannot be identified by a mere printout from the application of existing computer programs. Instead, new programs must be designed to scan computer records, and machine processes must be employed in order to extract from the existing tapes the names and addresses of purchasers who acquired shares during the relevant period. It is the cost of such new programming and additional procedures, with attendant labor costs, that make up the expense of identifying and assembling the names and addresses of members of the class. As of October 10, 1973, the transfer agent estimated the identification and assemblage costs would total approximately $16,580;[8] doubtless such costs have increased substantially in the intervening years.

The plaintiffs have unequivocally stated on the record that they will not bear the expense of the special programming necessary to identify the members of their class and that if they are required to pay such costs they will not continue to prosecute this action as a class suit.[9]

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made, there were over 173,000 shareholders. During the relevant period, daily sales and redemptions ranged from 18,549 and 16,364 shares, respectively, to 58,170 and 14,000 shares, respectively.

[8] Mailing, printing and other costs related to the sending of class notice were estimated at an additional $5,000.

[9] As is pointed out in this Court's *Eisen IV* opinion, the plaintiffs there took a similar position with respect to the costs involved in providing individualized notice to class members. 417 U.S. at 175.

During the course of the proceedings in the District Court concerning the class determination motion and after the Second Circuit had rendered its decision in *Eisen III* (approved in substance by this Court in *Eisen IV*), the plaintiffs sought to eliminate the expense of identifying and assembling the names and addresses of the class members, and thereby to reduce class notice costs to plaintiffs,[10] by a dual proposal: (i) amending the description of the class to eliminate therefrom all persons who were not shareholders at the time of mailing of the class notice and (ii) inserting the class notice in a regular mailing to be sent by the Fund to all of its current shareholders, whether or not they were members of the class. Defendants opposed this proposal on the grounds that (i) the proposed mailing of a class notice to all current shareholders would have a serious adverse effect on the Fund and its shareholders and might well precipitate substantial demands for redemption by the current shareholders, many of whom are not members of the class, and (ii) that the proposed class modification was arbitrary and improper.

Decision and Order of the District Court

In its opinion of May 15, 1975, the District Court found that this action could be maintained as a class action on behalf of the current and former shareholders originally described in plaintiffs' motion for class determination. The District Court rejected plaintiffs' proposal to eliminate members of the class who were former shareholders as arbitrary and improper, and, referring to defendants' objections based upon potential injury to the Fund and its shareholders, declined to direct the insertion of class notice in a regular Fund mailing to all current shareholders.

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[10] While the existing computer tapes and records have been available to plaintiffs, they have consistently refused to undertake the procedures necessary to identify class members at their own expense. As indicated, they have also refused to reimburse the defendants for performing such work. *Supra* at p. 6.

Although the District Court apparently recognized that the expense of culling out and assembling the class members' names and addresses was an element of the cost of notice under Rule 23(c)(2) (App. A, pp. 2a, 7a.), it also determined that the Fund was "to be responsible for whatever work and expense is involved in providing the list of class members to plaintiff." (App. A, p. 2a.) Citing no authority for its self-arrogated discretion to impose identification costs on the Fund, the District Court asserted two reasons for its decision to do so: (i) "the expense is relatively modest" and (ii) "defendants . . . are seeking to have the class defined in a manner which appears to require the additional expense." (App. A, p. 6a.)

All parties moved for reargument, and, thereafter, on October 1, 1975, the District Court entered a Memorandum Order which directed that the cost of identifying and assembling the names and addresses of the class members should be borne by the Fund without prejudice to its right, at the conclusion of the action, to make whatever claim it would be legally entitled to make for reimbursement by other parties, and authorized the mailing of the class notice at plaintiffs' expense in a regular Fund mailing, provided the notice is sent only to class members. (App. B, p. 9a.)

The Circuit Court Three-Judge Panel Decision

In a 2-1 decision (Hays, J., dissenting), a majority of the Court of Appeals panel (Mulligan and Palmieri,[11] JJ.) reversed the District Court's order to the extent that it had imposed on the Fund the cost of ascertaining and assembling the names and addresses of the class members and held that, in accordance with this Court's decision in *Eisen IV*, the cost of identifying the members of the class must be borne in the first instance by the plaintiffs as part of the cost of providing notice to those members pursuant to Rule 23(c)(2).

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[11] Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

The majority stated that the District Court's two justifications for allocating identification costs to the Fund, namely, consideration of the financial resources of the parties and defendants' position on class redefinition, were erroneous (App. C, pp. 19a-20a.); that the Fund's status, as a nominal defendant from which no recovery is sought and to which no financial benefit can result,[12] made "it totally improper to impose costs on the Fund" (App. C, p. 17a.); that there were no fiduciary relationships or other extraordinary facts in this case which would warrant shifting notice costs from plaintiffs to any of the defendants under an exception to the general rule enunciated by this Court in *Eisen IV* (App. C, pp. 18a-19a.); and finally that the federal discovery rules were not applicable to obtain class member identification for the purposes of the initial class notice, but, even if applicable, the defendants would not be required to bear the cost of identification under those rules because of the protective provisions of Rule 33(c) (App. C, pp. 21a-23a.).

The Circuit Court En Banc Decision

On application of the plaintiffs, the matter was reconsidered en banc by the Court of Appeals. A majority of the ten-member panel (Mulligan, Meskill and Van Graafeiland, JJ., dissenting) affirmed the District Court's order directing the Fund at its own expense to create the programs necessary to identify the names and addresses of the members of the class plaintiff.

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[12] The majority stated: "since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it." (App. C, p. 18a.) The Fund's status is completely different than that of a corporate defendant in a stockholders' derivative action, wherein any damage award accrues to the benefit of the corporation.

Although the issue arose under plaintiffs' Rule 23 motion for class determination and not under any discovery rule, the en banc majority stated that "it hardly require[d] . . . extended discussion to establish that" the information sought as to the identities of the class members was "within the broad scope of permissible discovery," and held that Rule 34 provided the basis for the District Court's order that the cost of producing such information be allocated to the Fund.[13] (App. E, p. 40a.)

The en banc majority's reasoning, which the dissenting judges found "bewildering", was that Rule 26 (b)(1) makes discoverable any unprivileged matter relevant to the "subject matter involved in the pending action"; that *Eisen IV* "raises as a potential issue in all such litigation whether the required notice has properly been sent"; and, accordingly, a list of the names and addresses of the class members "would of course be essential to the resolution of that issue". (App. E, p. 40a.).

The majority did not acknowledge the fact that the issue of "whether [Rule 23(c)(2)] notice has properly been sent" to all members of the class has never been raised in this case.[14] Having interjected an illusory issue, the majority

concluded that class identification for the sole purpose of providing class notice is governed by the federal discovery rules and not by Rule 23(c)(2) which expressly requires identification of the members of the class, if it can be accomplished through reasonable effort, as a predicate to sending individualized notice to the class.

Further, the majority ruled that the Fund is not entitled to the protection of Rule 33(c) which allows a party answering interrogatories calling for abstracts and compilations of business records to produce its existing records from which the party seeking discovery may extract the information sought at its own expense. The Court held that, on its reading of Rule 33(c), it was "inapplicable [and] not especially tailored to the discovery problems posed by contemporary computer technology." (App. E, p. 42a.) However, on this issue, the en banc majority qualified its decision as follows: "We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable." (App. E, p. 42a n.1.)

In a dissenting opinion which incisively analyzed the errors in logic, law and fact of the en banc majority, three members of the en banc panel[15] vigorously criticized the imposition of identification costs on the Fund, finding the majority opinion "illogical", "conceptually unsound" and "unprecedented", and, further, that it "flouted" the holding of this Court in *Eisen IV*. The dissenters would reverse that portion of the District Court order pertaining to identification costs for the reasons advanced in the majority opinion of the original panel, and because the en banc majority "forces the defendant[s] to subsidize the suit against them, a result which is aberrant to our jurisprudence and to the extent that it depends upon the premise that the defendant has greater financial resources is further in conflict with *Eisen IV*." (App. E, p. 48a.)

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[13] Rule 34(a) in pertinent part provides:

> "(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request . . . . to inspect and copy, any designated documents (including . . . data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form). . . ."

[14] The majority's failure to reconcile the non-existence in fact of this issue was criticized by the en banc dissenters. (App. E, pp. 51a-52a.) The issue could not be, and in fact was not, raised by the representative plaintiffs, or the District Court or the three-judge panel of the Court of Appeals.

[15] The dissenters were Circuit Judges Mulligan, Van Graafeiland and Meskill. Circuit Judge Edmund L. Palmieri sat by designation on the original panel and was the author of the majority opinion; he did not participate in the rehearing en banc.

Reasons for Granting the Writ

This case raises basic federal questions concerning defendants' constitutional rights, the proper incidence of the costs of maintaining Rule 23(b)(3) class actions and the purpose and lawful scope of the federal discovery procedures. The resolution of these questions will have immediate importance in a large number of class actions and other civil suits now pending and likely to be commenced in the future.[16]

By misapplication of the federal discovery rules, the Court below required the defendant Fund to pay the substantial cost of special computer programming necessary to identify and assemble the class members' names and addresses for the purpose of the initial class notice mandated by Rule 23(c)(2).

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[16] Judge Mulligan, dissenting in the en banc opinion, stated:

> "We expect that until the Supreme Court intervenes this court will be asked to further rule on this issue. The burden is not inconsiderable. There were 176 class actions filed in the Southern District of New York alone in fiscal 1976 and at the end of fiscal 1976, 408 class actions were pending in that district. There were 724 pending at the time in all the districts of this Circuit. Total filings of class actions in United States courts increased from 2,717 in 1974 to 3,584 in 1976 with 5,987 pending at the end of fiscal 1976. Administrative Office of the United States Court, 1976 Annual Report of the Director 117-24." (App. E, pp. 54a-55a n.5.)

In addition, the questions of defendants' rights and the perimeters of discoverable information have a direct bearing on civil suits, generally, not merely class actions.

Certiorari should be granted for the following reasons:

1. The decision below directly conflicts with the decision of this Court in *Eisen IV* on the question of which party should bear the costs of the notice to class members required by Rule 23(c)(2). It will cause great confusion and burden the lower federal courts with an increased amount of vexatious litigation if it is permitted to stand without review.

2. The decision below directly conflicts with the decision of the Fifth Circuit, rendered virtually simultaneously on the same question in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977). This will cause still further confusion and vexatious litigation if it is permitted to stand without review.

3. The decision below improperly circumvents Rule 23 and *Eisen IV* by authorizing discovery beyond the scope authorized by Rule 26(b)(2), misinterprets and misapplies Rules 33(c) and 34, thereby creating an undesirable, broad precedent governing a new and important phase in the discovery of computerized information, and allocates these purported discovery costs in a wholly arbitrary and unfair manner.

I.

The Decision Below Has Improperly Circumvented the Provisions of Rule 23 of the Federal Rules of Civil Procedure and Directly Conflicts With the Decision of This Court in *Eisen IV*.

A. The Court Below Incorrectly Decided That the Cost of Identifying the Members of the Class and Ascertaining Their Addresses Is Not a Part of the Cost of the Notice Required by Rule 23(c)(2), Which This Court in *Eisen IV* Held Should Be Borne by Plaintiffs.

The en banc majority held that, in this Rule 23(b)(3) class action, the defendant Fund is required to pay more than 75 per cent of the cost that must necessarily be incurred in providing individualized notice of the action's pendency to all members of the class. This is in direct conflict with this Court's *Eisen IV* holding that, in such litigations, "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Eisen IV*, 417 U.S. at 179.

Although the majority paid lip service to the *Eisen IV* rule that the plaintiff must initially bear the cost of notice to the class, the majority simply ignored the plain fact that the effect of its ruling was to vitiate this Court's *Eisen IV* decision.

The majority attempted to distinguish between (i) the costs that plaintiffs are required to bear in providing individualized notice to the class pursuant to Rule 23(c)(2), including the cost of printing the notice and of procuring, stuffing, addressing and posting the envelopes sent to each member of the class and (ii) the cost of obtaining the names and addresses to be affixed to the envelopes so sent, which cost, the majority concluded, must be borne by the defendant Fund. The majority of the three-judge panel, and the en banc dissenters, were unable to perceive any logical basis for such a distinction, the latter stating:

> "We cannot appreciate how it can be reasonably held that the expense incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice." (App. E, p. 49a.)

The en banc majority interpretation finds no support in Rule 23(c)(2), under which the court is required to direct to class members "the best notice practicable under the circumstances, *including individual notice to all class members who can be identified through reasonable effort.*" (emphasis added) The language of Rule 23(c)(2) does not distinguish between the process of identification and the notification procedure. The plain import, not contradicted by any other provision of Rule 23, is that ascertaining the names and addresses of the class members is an essential and integral part of the process of giving notice to each of those persons.

A substantial majority of the relevant cases have not made the arbitrary distinction created by the en banc majority below and have treated the cost of class member identification as part of the cost of providing notice pursuant to Rule 23(c)(2).[17] In several of these cases, which antedate this Court's decision in *Eisen IV*, district courts allocated identification and other notice costs to one or more of the defendants on the basis that the cost of notice was an appropriate area for exercise of the courts' discretion. *See, e.g., Berland* v. *Mack,* 48 F.R.D. 121, 131-33 (S.D.N.Y. 1969). The *Eisen IV* decision terminated that discretion, holding that notice costs must be borne by the plaintiff in the usual case. But these early cases remain significant in that they demonstrate a consistent judicial recognition, both before and after this Court's decision, that the identification of class members is an element of the Rule 23(c)(2) notice procedure.

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[17] Although the rationale of the respective courts is sometimes unclear, the following decisions treat the cost of class member identification as a cost of notice: *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977) (discussed at length *infra*); *In re Sugar Industry Antitrust Litigation,* 73 F.R.D. 322, 359-60 (E.D. Pa. 1976); *In re Franklin National Bank Securities Litigation,* 73 F.R.D. 25 (E.D.N.Y. 1976) (relying upon the holding of the original panel of the Court of Appeals in this case); *Popkin* v. *Wheelabrator-Frye, Inc.,* CCH Fed. Sec. Law Rep. ¶ 95,411 (S.D.N.Y. 1976); *City of New York* v. *Darling-Delaware, Inc.,* 1976-1 CCH Trade Cases ¶ 60,812 at pp. 68,512, 68,514 (S.D.N.Y. 1976); *In re U. S. Financial Securities Litigation,*

In the course of dealing with class member identification under the Rule 23(c)(2) notice procedure, some courts have ordered the defendant to provide the plaintiff with business records and other raw materials, or access thereto, from which the plaintiff has been required to extract the class members' names and addresses. *E.g., City of New York* v. *Darling-Delaware, Inc.,* 1976-1 CCH Trade Cases ¶ 60,812 at pp. 68,512, 68,514 (S.D.N.Y. 1976); *Herbst* v. *International Telephone & Telegraph Corp.,* 65 F.R.D. 13, 19-21 (D. Conn. 1973). This is entirely consistent with the view that class member identification is part of the Rule 23(c)(2) notice procedure and resort to the discovery rules for authority to enter such orders is unnecessary. Under Rule 23(d), the district court can direct a defendant to furnish relevant raw materials to the plaintiff.[18] *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1102 (5th Cir. 1977) (discussed at length *infra*). Here, the computer tapes and records from which the class

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69 F.R.D. 24, 46-47 (S.D. Cal. 1975); *Hawkins* v. *Holiday Inns, Inc.*, 1975-1 CCH Trade Cases ¶ 60,153 at p. 65,465 (W.D. Tenn. 1975); *B&B Investment Club* v. *Kleinert's, Inc.*, [1973-1974 Transfer Binder] CCH Fed. Sec. Law Rep. ¶ 94,451 at pp. 95,572-73 (E.D. Pa. 1974); *Grad* v. *Memorex Corporation,* 61 F.R.D. 88, 103 (N.D. Cal. 1973); *Herbst* v. *International Telephone & Telegraph Corp.,* 65 F.R.D. 13, 19-21 (D. Conn. 1973), *aff'd,* 495 F.2d 1308 (2d Cir. 1974); *Lamb* v. *United Security Life Co.,* 59 F.R.D. 25, 42-43 (S.D. Iowa 1972); *In re Antibiotic Antitrust Actions,* 333 F.Supp. 278, 290-91 (S.D.N.Y. 1971); *West Virginia* v. *Chas. Pfizer & Co.,* 314 F.Supp. 710, 724-25 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079, 1083 (2d Cir.), *cert. denied, sub nom., Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *State of Illinois* v. *Harper & Row Publishers, Inc.,* 301 F.Supp. 484, 494 (N.D. Ill. 1969); *Berland* v. *Mack,* 48 F.R.D. 121, 131-33 (S.D.N.Y. 1969); *Herbst* v. *Able,* 47 F.R.D. 11, 17-19 (S.D.N.Y. 1969); *Brennan* v. *Midwestern Life Insurance Co.,* 259 F.Supp. 673, 684 (N.D. Ind. 1966).

Four United States District Courts appear to have distinguished between the notification procedure under Rule 23(c)(2) and the process of identifying the persons to whom such notice must be given. Three such cases were decided in the Eastern District of Pennsylvania. *Chevalier* v. *Baird Savings Ass'n.*, 72 F.R.D. 140, 148 (E.D. Pa. 1976) (citing the decision of the District Court in this case); *In re Penn Central Securities Litigation,* 416 F.Supp. 907, 921 (E.D. Pa. 1976), *rev'd,* No. 76-2139 (3d Cir. August 5, 1977); *Richardson* v. *Hamilton International Corp.,* 62 F.R.D. 413, 423 (E.D. Pa. 1974). There is a clear conflict of authority in the Eastern District of Pennsylvania on this issue. *In re Sugar Industry Antitrust Litigation, supra,* at 359-60 (E.D. Pa. 1976), and *B&B Investment Club* v. *Kleinert's Inc., supra,* at 95,572-73 (E.D. Pa. 1974), hold that the cost of identification is part of the cost of notice which must be borne by the class representatives. The fourth case was decided by the United States District Court for the District of Columbia and is based solely on the erroneous interpretation that *Eisen IV* implicitly distinguishes between identification and notice. *Foster* v. *Maryland State Savings & Loan Ass'n.*, 1974-2 CCH Trade Cases ¶ 75,277 (D.D.C. 1974).

None of the above cases is cited in the en banc majority opinion. However, the conflict between these cases and those holding that identification is a component of the notice procedure and the resulting confusion of courts and litigants underscore the need for review and resolution by this Court.

[18] Rule 23(d) grants broad powers to a court in managing a class action, including the power to make appropriate orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action. . . ."

Moreover, this Court has long recognized the salutary "power inherent in every court to control the disposition of the causes on its docket. . . ." *Landis* v. *North American Co.,* 299 U.S. 248, 254 (1936).

members can be identified are fully available to the plaintiffs, and the defendants have never sought to deny plaintiffs access thereto. However, consistent with this Court's *Eisen IV* decision, the Fund should not be compelled at its own expense, and without the possibility of any financial benefit to itself, to refine this material to effect class member identification, thereby forcing it to assume the greatest part of plaintiffs' burden of providing notice to the class.[19]

The cost of class member identification, like other notice costs, should be borne initially by the four plaintiffs as part of the ordinary burden of financing their own suit. Here, as in most cases, the names and addresses of the class members are in no way related to any substantive or procedural matter at issue, nor to the proof of any substantive or procedural allegation or claim contained in the complaints, nor to any denial, claim or defense contained in the answers.[20] The information is useful only in accommodating the plaintiffs' desire to comply with the Rule 23 (c)(2) notice provisions requisite to commencing this action in the form of a class suit against the defendants. The mere pleading of allegations sufficient to state a valid class interest, which have nothing whatsoever to do with the merits of plaintiffs' claims of wrongdoing, should not effectively transfer to the defendants, and impose upon

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[19] In none of the cases decided after *Eisen IV*, cited in the first paragraph of note 17, *supra*, does it appear that the defendant was required to incur any significant unreimbursed expense in assisting the plaintiff to identify the class. In *Hawkins* v. *Holiday Inns, Inc., supra*, note 17, defendant was required to provide the plaintiff with a list of the names and addresses of the 1,000 member class. However, the class as there defined essentially consisted of all the defendant's current franchisees, whose names and addresses were apparently set forth in an existing list.

[20] Therefore, as discussed *infra* at pp. 25-27, the names and addresses are not a proper subject of discovery.

them, the financial obligations attending the commencement of plaintiffs' suit.

In *Eisen IV*, this Court recognized the serious due process infirmity inherent in ordering the defendants to pay the plaintiff's costs, the payment of which was a condition precedent to institution and maintenance of the action. In this regard, this Court found no justification for distinguishing between class actions and other forms of adversary proceedings. In the instant case, there is no justification for drastically altering the holding by means of a fancied distinction between the cost of class member identification and other costs solely attributable to instituting a class suit, such as class notice or service of process.

The opinion of the en banc majority is based upon and, if allowed to stand, will perpetuate both of the arbitrary and constitutionally impermissible distinctions referred to above. In so doing, that decision ignores this Court's mandate and "contravenes [Rule 23] by allowing a representative to secure the benefits of a class action without first satisfying the requirements for it." *Eisen IV*, 417 U.S. at 748.

B. The Court Below Resorted to Procedures Extraneous to Rule 23 to Satisfy Rule 23 Requirements and Thereby Misinterpreted and Misapplied This Court's Holding in *Eisen IV* and Improperly Circumvented the Provisions of Rule 23.

In *Eisen IV*, 417 U.S. at 178-79, this Court held:

> "*In the absence of any support under Rule 23* petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class . . . as part of the ordinary burden of financing his own suit." (emphasis added)

Notwithstanding this clear language, the en banc majority erroneously concluded that the cost of class identification (or presumably any other cost of providing notice) can and should be allocated to the defendant if such allocation, although lacking support in Rule 23, has a basis *elsewhere* in the Federal Rules of Civil Procedure. Claiming to find such a basis in Rule 34, one of the discovery rules, the en banc majority considered that it was free under *Eisen IV* to excise class member identification from the notice procedure.[21]

It is submitted that the majority did not reasonably or correctly interpret this Court's holding. In *Eisen IV* this Court expressly rejected an allocation of notice costs by the district court based upon procedures extraneous to Rule 23, such as a preliminary inquiry into the merits derived from the procedures applicable to preliminary injunctions. In contrast to the en banc majority, the United States Court of Appeals for the Fifth Circuit correctly interpreted this Court's *Eisen IV* holding as follows:

> "As to the propriety of imposing a portion of the costs of notice upon the *Eisen* defendants, [this] Court found that under rule 23, no support whatsoever existed for entering such an order." *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1101 (5th Cir. 1977).[22]

In determining which party should bear the costs of satisfying the Rule 23(c)(2) notice requirements, this Court, in *Eisen IV*, plainly limited the scope of its search

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[21] The en banc majority opinion states (App. E, p. 40a.):

"In *Eisen,* the plaintiff's effort to impose the cost of notice upon the defendants failed '[i]n the absence of any support under Rule 23.' Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the [F]und, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records."

[22] See discussion *infra* at pp. 22-24.

to "the language [and] history of Rule 23" and rejected a notice cost allocation based on procedures outside the Rule. *Eisen IV*, 417 U.S. at 749. In this case, the District Court, the en banc majority and the plaintiffs all agree that the identification of class members is necessary *only* to satisfy the Rule 23(c)(2) notice requirements. Nevertheless, the en banc majority held that one of the defendants, the Fund, although devoid of any financial interest in the litigation, must pay the cost of class identification on the basis of the discovery procedures under Rule 34. The en banc majority's circumvention of Rule 23 procedures to satisfy Rule 23 requirements is precisely what was condemned by this Court in *Eisen IV*.

If allowed to stand, the decision of the en banc majority will substantially derogate from the clear rule in *Eisen IV* on the incidence of notice costs. The en banc majority opinion creates uncertainty and enormous further litigation potential for class representatives to posit bases outside Rule 23 for the apportionment of subdivision (c)(2) notice costs—an effect which will be significant in a large number of class actions now pending and likely to be commenced in the future.[23]

The decision below is in conflict with and substantially undercuts this Court's decision in *Eisen IV;* it should be reviewed and reversed by this Court.

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[23] *E.g., In re Franklin National Bank Securities Litigation,* 73 F.R.D. 25 (E.D.N.Y. 1976), *appeal pending,* No. 76-7616 (2d Cir., filed December 9, 1976). Plaintiffs attempted unsuccessfully in the district court to impose costs of class identification on nonparty broker-dealers on the basis of the discovery rules.

II.

The Decision Below on Class Member Identification Costs Directly Conflicts With the Decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation* and Will Cause Confusion in Numerous Class Actions Unless Resolved by This Court.

A. The Conflict With the Fifth Circuit

In holding that under federal discovery procedures the Fund, a nominal defendant, may be compelled at its own expense to identify absentee class members to assist plaintiffs in meeting their notification obligations under Rule 23(c)(2), the en banc majority opinion directly conflicts with the recent decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977) ("*Nissan Motor*").

In *Nissan Motor,* which was decided shortly before the en banc majority opinion was filed, the plaintiffs, as here, sought an order directing one of the defendants at its expense to search its business records, which were also available to plaintiffs, to compile a list of the names and addresses of the class members to whom individual notice of the action would be sent. Like plaintiffs here, the *Nissan Motor* plaintiffs advised the court that they would not search the defendants' records nor would they bear the cost of the defendants' search.

The Fifth Circuit unequivocally rejected the argument which the en banc majority here accepted, holding:

> "The time and expense of gathering [class members'] names and addresses is a necessary predicate to providing each with notice of the action's pendency without which the action may not proceed. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. at 179, 94 S. Ct. at 2153. Viewed in this context, it becomes strikingly clear that *rather than being controlled by the federal civil discovery rules, identification of absentee class members' names and addresses is part and parcel of rule 23(c)(2)'s mandate that the class members receive 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'*" (emphasis added) 552 F.2d at 1102.

Consistent with this Court's *Eisen IV* holding on the incidence of notice costs, the Fifth Circuit further held that the plaintiffs were required at their own expense to compile a list of the class members' names and addresses from defendants' records,[24] stating:

> "Upon commencing a class action, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members as well as paying the costs of their individual notice." *Id.* at 1102.

B. The Impact on Other Cases

If the expense of class identification, which is often substantial, is deemed to be a discovery cost allocable to the responding party, as the en banc majority decided below, the rule that the plaintiff must bear the ordinary burden of financing his own suit is emasculated. Not only will defendants be required to pay for Rule 23(b)(3) class suits against them, but persons who are not parties to the action and have no financial interest in its outcome, a status not unlike the Fund's, will also be called upon to subsidize the cost of lawsuits commenced by would-be class representatives. Representative plaintiffs have not been reluctant to proceed under the federal discovery rules in an effort to require non-parties at their own expense to search records in their possession containing class members' names and addresses. In the Second Circuit alone, during a one-year period, at least four such discovery orders were sought. *In re Franklin National Bank Securities Litigation,* 73 F.R.D. 25 (E.D.N.Y. 1976) (order denied on basis of decision of the three-judge panel of the Court of Appeals herein), *appeal pending,* No. 76-7616 (2d Cir., filed December 9, 1976); *Jahre* v. *Rait,* 76 Civ. 1305 (E.D.N.Y. July 16, 1976) (prior *ex parte* order vacated); *Weiss* v. *Drew National Corp.,* 75 Civ. 4816 (S.D. N.Y. July 15, 1976) (order denied on basis of decision of original panel of Court of Appeals herein); *Frankenstein* v. *McCrory,* 74 Civ. 727 (S.D.N.Y. November 14, 1975) (order directing identification modified to provide for reimbursement). Undoubtedly, there were similar cases in other circuits. *See, e.g., In re Penn Central Securities Litigation,* 416 F.Supp. 907, 921 (E.D. Pa. 1976), *rev'd,* No. 76-2139 (3d Cir. August 5, 1977).

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[24] The Fifth Circuit declined to rule on whether *Eisen IV* compels this result in all cases where a "truly adversary" relation exists between the parties. It also refused to adopt the "rule of reason" approach, turning on which party would have the easier task in gathering the class information, which it discerned in the decisions of other courts. It was unnecessary to decide these issues, stated the Fifth Circuit, because under either approach the plaintiffs would be required to furnish at their own expense the necessary names and addresses. The same result would obtain in this case under the *Nissan Motor* holding, since the records from which the instant class members can be identified are also available to plaintiffs here and may be examined as readily and as effectively by the plaintiffs as by the defendants.

The majority decision of the Court below is in conflict with the decision of the Fifth Circuit, and involves an important question of federal law which should be settled by this Court.

III.

The Decision Below Is Predicated on an Interpretation of the Scope of Discovery Contrary to the Standards Set by Rule 26(b)(1), Misinterprets and Misapplies the Provisions of Rules 33(c) and 34 and Sanctions an Imposition of Costs on Defendants Without Factual or Legal Justification.

The decision below was reached as if the question of identification of class members and the costs thereof arose in discovery proceedings, when in fact it arose in connection with plaintiffs' motion for class determination under Rule 23. Even if the discovery rules could be considered under a class determination motion, they afford no basis for the en banc majority decision.

A. The Decision Below Contravenes Rule 26(b)(1) by Authorizing Discovery of Information That is Wholly Irrelevant to the Subject Matter of This Action.

Rule 26(b)(1) limits the scope of all discovery, whether sought pursuant to Rule 33, Rule 34 or any other federal discovery provision. 4 Moore's Federal Practice ¶26.56[1] at p. 26-115 (2d ed. 1976). Subdivision (b)(1) states: "[p]arties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved* in the pending action. . . ." (emphasis added) Professing to be guided by this standard, the en banc majority held that "the names and addresses of the members of the class [are] indeed within the broad scope of permissible discovery established by our Federal Rules." [25] (App. E, p. 40a.) The majority reached this erroneous conclusion in spite of the fact that plaintiffs seek the names and addresses solely for the purpose of class notification under Rule 23(c)(2), which purpose bears no relation whatsoever to the trial of any existing or anticipated substantive issue in this case, the jurisdiction of the court, or the requirements for maintenance of a class suit under subdivisions (a) and (b) of Rule 23.[26]

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[25] This rationale appears to have its origins solely in the en banc majority opinion. The opinion and order of the District Court below do not mention the federal discovery rules; that Court seems to have perceived the issue as one governed by Rule 23. (App. A, pp. 2a, 7a.)

The en banc majority tried to establish that the information sought by plaintiffs is relevant to the "subject matter involved" in this action, reasoning incorrectly as follows: (i) by mandating individualized notice to class members, "*Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. . . ." and (ii) "[a] list of the names and addresses of the class members would of course be essential to the resolution of that issue." (App. E, p. 40a.)

This is specious reasoning. The majority has based its rationale on a manufactured issue which has never been and is not now in this case, namely, "whether the [notice required by Rule 23(c)(2)] has properly been sent." In fact, plaintiffs here seek the names and addresses to satisfy the *mechanics* of Rule 23(c)(2) and not to obtain information relevant to any question of whether or not proper notification has been given. Plainly, this has nothing whatever to do with the subject matter involved in this action.

Moreover, if this action proceeds as a class action, proper notification will not be an issue in this case, since all of the members of the class can be identified and notice can be mailed to each member. Further, it is difficult to hypothesize the circumstances under which the issue of proper

notification could be raised by the named plaintiffs. As stated by the en banc dissent:

> "Should any issue arise, as to 'proper notification', e.g., was the list complete, was the notice appropriate, was the postage adequate, presumably it would be raised by a putative member of the class but not *in limine* by the plaintiffs who are required to notify and pay the costs of notification under *Eisen IV*." (App. E, p. 52a.)

The decision of the en banc majority permits discovery of information which is not relevant to the "subject matter involved" in this action but to the mechanical requirements of Rule 23(c)(2). In support of its decision, the en banc majority interjects an issue which is in reality utterly extrinsic to this case. The en banc majority here extends the scope of discovery beyond the perimeters of subject matter relevance established by Rule 26(b)(1) so that it seemingly encompasses any information that is useful to the plaintiff in instituting or prosecuting the suit. This construction is not limited in its applicability to the Rule 23(c)(2) notification procedure or to Rule 23(b)(3) class actions but is an untoward precedent in all civil actions to which Rule 26 applies.

B. The Decision Below Misinterprets and Misapplies the Provisions of Rules 33(c) and 34 on a Dispositive Issue in This Case.

For the reasons heretofore stated, the process of identifying the names and addresses of the class members must be treated as an integral part of the Rule 23(c)(2) notice procedure and not within the scope of discovery set by Rule 26(b)(1). However, if the federal discovery rules are deemed to apply, consistent therewith the Fund nevertheless cannot be compelled to bear the substantial expense of creating special computer programs to extract from its computerized business records, which are fully available

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[26] The District Court determined that all such requirements have been satisfied in this case, including "numerousness" (which pertains to the number and not the identities of the class members), "class definition" (which pertains to the specificity with which the class is defined), "common questions", "typicality", "adequacy of representation", "manageability" and "predomination". These determinations of the District Court are not disputed here.

to the plaintiffs, the names and addresses of the prospective class members. Rule 33(c) is expressly designed to protect parties, such as the Fund, who have records from which the desired information can be compiled. It permits a party to respond to burdensome interrogatories by affording the party seeking discovery "reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."[27]

The en banc majority held that the Fund is not entitled to the protection of Rule 33(c) because (i) the class members' names and addresses are contained in computer tapes and (ii) the production of computerized information is governed exclusively by Rule 34, which provides for the production, inspection and copying of "documents and things," including "data compilations[28] from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."

In so holding, the en banc majority was cautious to note: "We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable." (App. E, p. 42a n.1.) Contrary to the decision reached by the majority, if the federal discovery rules were applicable, Rule 33(c), not Rule 34, should govern the process of ascertaining the names and addresses of the members of the class.

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[27] Rule 33(c) recognizes the long-standing rule applied by courts in cases involving computerized information and other records. *E.g.*, *Adams* v. *Dan River Mills, Inc.*, 54 F.R.D. 220 (W.D. Va. 1972); *Tytel* v. *Richardson-Merrell, Inc.*, 37 F.R.D. 351 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures, Inc.*, 20 F.R.D. 588, 593 (S.D.N.Y. 1957).

[28] The Advisory Committee Note (48 F.R.D. 487, 527) to the addition of the category "data compilation" to Rule 34 indicates that the amendment was merely intended to clarify the scope of the Rule, not to change it. *United States* v. *Davey*, 543 F.2d 996, 999 (2d Cir. 1976). This would indicate that Rule 34 is intended to have no special or exclusive application to computer data. Rule 33(c) also speaks of "compilations."

The class members' names and addresses are not subject to Rule 34, which "applies only to documents and things that are already in existence. . . ."[29] 4A Moore's Federal Practice ¶ 34.05[1] at p. 34-32 & n.4 (2d ed. 1975). In the case of existing "electronic data compilations," the Advisory Committee's Note states that the "respondent may be required to use his devices to translate the data into usable form [often] a print-out of computer data." Advisory Committee Note, 48 F.R.D. 487, 527 (1970). A printout of existing computer data can generally be made at nominal expense. However, the identities of the class members here are not an existing data compilation; a compilation of such information can be created only at substantial expense through the design and implementation of new computer programs to scan and refine the existing data. The clear distinction between the scope of Rule 34 and the production of information sought by plaintiffs here, was recognized in the majority opinion of the original Court of Appeals panel.[30]

The computerized business records, from which a list of the names and addresses can be compiled, are fully available to plaintiffs, who can examine the records as easily and as effectively as can the defendants. Plaintiffs simply seek to have this research and compilation of data performed for them. These are precisely the circumstances under which Rule 33(c) is intended to afford protection to the responding party; the fact that here the records are computerized does not preclude the application of the Rule.

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[29] As to the scope of examination, Rule 34 is to be construed in pari materia with Rule 45, which provides for the subpoena duces tecum. 4A Moore's Federal Practice ¶ 34.02[1] at pp. 34-12—34-13 (2d ed. 1975).

[30] *"The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned.* If 'sophisticated electronic manipulation and analysis' become necessary, *'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.'* 8 C. Wright and A. Miller, Federal Practice & Procedure §2218 at 659 (1970)." (emphasis added) (App. C, p. 23a n.7.)

For example, in *Laufman* v. *Oakley Building and Loan Company*, 72 F.R.D. 116, 121 (S.D. Ohio 1976), the defendants were given the option provided by Rule 33(c) in response to interrogatories addressed to material contained in computer banks. This is consonant with the treatment of computerized business records in other contexts. Computerized information has been held to constitute "business records" under the Business Records Act, 28 U.S.C. §1732. *United States* v. *Fendley*, 522 F.2d 181 (5th Cir. 1975); *United States* v. *Russo*, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974). Under Fed. Rules Evid. Rule 803(6), 28 U.S.C., business records include "data compilations." The Advisory Committee Note to the business records rule states that the term "data compilations" is borrowed from Rule 34(a) and includes electronic computer storage.

There is no reason to differentiate between business records stored in a computer and other basic types of records. Discovery requests relating to computer records should be treated in a manner consistent with similar requests for other types of information. Indeed, the potential for abuse of the kind which Rule 33(c) was intended to ameliorate is greater in the case of computer records than in other settings. Where the information was not recorded in computer tapes in the form later desired by the party seeking discovery, that party should bear the

burden, under Rule 33(c), of developing the special programs for the analysis and reorganization of the existing computer tapes. The procrustean decision of the en banc majority, denying application of Rule 33(c) in all cases of computerized business records, imposes an unfair burden on the responding party in this case, and, because on this point the majority opinion is absolute, ensures a perpetuation and proliferation of this inequity in numerous cases involving computerized business operations that will be decided in the district courts.[31]

C. Even if the Discovery Rules Were Applicable, the Factors Relied on by the Court Below Do Not Justify the Imposition of the Substantial Costs of Class Identification on the Financially Disinterested Fund.

Holding that the District Court committed no abuse of discretion in imposing class identification costs on the Fund, the en banc majority stressed two considerations: (i) the expense thus imposed is not unreasonable in light of "the nature of the information sought" and the "vast and complex" business operations of the Fund, and (ii) the expense "was occasioned by the [district] court's agreement with defendant that the [F]und would have been harmed by the proposed class redefinition." (App. E, pp. 44a, 46a.)

As pointed out by the en banc dissent, any cost allocation turning upon the first consideration in a class action context would necessarily be inflexible, since such actions are invariably brought against those whose financial resources are vast in comparison with those of the plaintiffs.

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[31] Thus, the en banc dissent wrote:

> "To require corporate defendants to so arrange their computer programming as to anticipate the endless variety of prospective classes which might someday bring class actions is, of course, unrealistic and not required by any law we know of until this decision which hopefully will be short lived." (App. E, p. 54a.)

(App. E, p. 53a.) Moreover, this consideration was expressly rejected in *Eisen IV*, 417 U.S. at 1176, where this Court stated: "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs."

The second consideration relied on by the en banc majority erroneously assumes a logical or equitable nexus between (i) the defendants' opposition to a redefinition of the class posed by plaintiffs and rejected by the District Court as arbitrary and improper and (ii) the defendants' obligation to identify the members of the class as originally defined for the purpose of notifying such persons. If, as found by the District Court, the proposed redefinition was arbitrary and improper, then defendants were justified in opposing it, and, by so doing, should not be subjected to a liability that they would not otherwise be required to bear. The en banc dissent correctly states: "If this is to be the law the opportunities for abuse become obvious." (App. E, p. 54a.) The issues of proper class definition and class member notification are discrete; each should be dealt with separately, on its own terms. Moreover, the District Court's ruling that plaintiffs could not exclude from their class those persons who had sold all of their shares and ceased to be shareholders of the Fund does not affect the cost of identifying the class, since, had such persons been excluded, it still would have been necessary to devise new computer programs to ascertain and assemble from the Fund's list of current shareholders the names and addresses of those who purchased shares during the class period.

In addition to vitiating this Court's decision in *Eisen IV*, the decision below incorrectly resolves important questions of federal law concerning the scope and purposes of the federal discovery procedures and the problems of accommodating these procedures to the development of computer technology. It should be reviewed and reversed by this Court.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

DATED: New York, New York
August 31, 1977

Respectfully submitted,

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APPENDIX

APPENDIX A

District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
69 Civ. 1242 (T.P.G.)

IRVING SANDERS,
Plaintiff,
v.
LEON LEVY, et al.,
Defendants.

EGON TAUSSIG,
Plaintiff,
v.
SIDNEY M. ROBBINS, et al.,
Defendants.

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs,
v.
ERIC HAUSER, et al.,
Defendants.

GRIESA, *J.*

Plaintiffs have moved for class action treatment of a part of these consolidated cases, which consist of both class and derivative claims. Certain problems have been raised, mainly as to the definition of the class and as to who is to bear certain expenses connected with the giving of notice.

I have concluded that the class claims are properly brought under Fed. R. Civ. P. 23 (b)(3), and that the class shall consist of all persons who purchased shares of defendant Oppenheimer Fund, Inc. ("the Fund") between March 15, 1968 and April 24, 1970. The Fund is to be responsible for whatever work and expense is involved in providing the list of class members to plaintiffs. Thereafter plaintiffs will be responsible for mailing the necessary notices, and will bear the necessary costs.

I.

The three captioned actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively. They were consolidated on December 17, 1969.

Plaintiffs own shares in defendant Fund, which is an open-ended investment Fund registered under the Investment Company Act of 1940 (15 U.S.C. §§80a et seq.). Shares are sold by the Fund or its agents to the public at a price which represents the net asset value of the shares plus a sales charge. The Fund has about 174,000 shareholders who hold over 67 million shares.[1]

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[1] Technically, the Fund shares are held in two forms. There are about 86,000 shareholders who own their shares of the Fund directly. The other 88,000 are held by Oppenheimer Systematic Capital Accumulation Program ("OSCAP"), which holds shares of the Fund as "custodian". The 88,000 participants in the OSCAP plan are termed "planholders" and own undivided interests in the total number of shares held by OSCAP.

For the purposes of this opinion, I am considering the OSCAP planholders as shareholders of the Fund. In connection with the class action motion, the parties have proceeded on this basis.

Defendant Oppenheimer Management Corporation ("the Manager") acts as manager of the Fund's investment portfolio. Pursuant to an Investment Advisory Agreement, the Manager receives a fixed fee calculated as a percentage of the Fund's net asset value. In addition to the fixed fee the Manager also receives a fee in each year that the Fund betters its market rating over the preceding year.

Defendant Oppenheimer & Co., a brokerage firm, is a partnership that owns about 82% of the Manager's stock. This 82% includes 100% of the voting stock. The individual defendants are all directors or officers of the Fund or of the Manager, or partners in Oppenheimer & Co. Some of the individuals are principals in all three organizations.

Plaintiffs allege that defendants violated the federal securities laws by failing to disclose material information to investors. Plaintiffs point particularly to the Fund prospectuses of March 15, 1968, September 3, 1968 and April 25, 1969. Specifically plaintiffs claim that defendants failed to state that the Fund would purchase "restricted" securities and failed to describe the risks involved in such purchases. They further claim that the Fund overvalued the restricted securities it owned, and failed to disclose material information in regard to the valuation of restricted securities—namely the method used to value them. As a result, according to plaintiffs, the total net assets of the Fund were overstated causing a concomitant overvaluation of Fund shares being sold to the public. Plaintiffs allege also that by virtue of the fee arrangement with the Manager the overvaluation of Fund net assets caused the Fund to pay excessive fees to the Manager.

Plaintiffs sue to recover damages on behalf of shareholders who paid excessive prices for their Fund stock;

and derivately on behalf of the Fund to recover the allegedly excessive fees paid to Manager. Defendants deny the material allegations made in the complaints.

III.

The requirements of a class action under Rule 23 are clearly met in the present case. The class will number about 121,000 members, so that the numerosity requirement is met. There are questions of law and fact common to the class within the meaning of Rule 23(a)(2), and indeed it is clear that the questions of law and fact common to the members of the class predominate over any question affecting only individual members, within the meaning of Rule 23(b)(3). The core of the class claims relates to the questions about whether or not material information about the valuation of restricted securities was withheld from investors in the Fund. There are also the questions relating to the responsibility of the various defendants in the event that there was a withholding of material information. All of these matters relate to issues common to the class. It is by now established that in such a situation a class action is appropriate, despite the fact that there may be individual issues relating to causation and damages.

Defendants make an argument that the class claims are unmanageable because the average recovery per class member is estimated to be between $2.00 and $24.00. Plaintiffs contend that these averages are misleading and that numerous persons in the class would recover substantial amounts. On the basis of the information presently available, I am of the opinion that it would be inappropriate to declare these class claims unmanageable. At least as far as the present record shows, these class claims partake of no more difficulty than is attendant upon the claims in numerous class actions which the federal courts have entertained. If, at a later point in the action, a clearer demonstration of unmanageability is made, the court can deal with this problem. Also, no question has been raised about the adequacy of the named plaintiffs and their counsel to represent the class.

I therefore conclude that this is a proper class action under Rule 23(b)(3).

IV.

Originally plaintiffs sought to represent all persons who purchased Fund shares during the relevant period—both past and present owners. However, it then appeared that the cost of compiling this list of persons from defendants' records would, according to defendants' estimate, be approximately $16,000. Plaintiffs then suggested a modification intended to eliminate this expense. The proposal is to break out of the class those Fund shareholders who have sold their shares (about 18,000 persons), and to include only those shareholders who still own their shares (about 103,000 persons). Defendants oppose the suggested cut, presumably because it would limit the res judicata effect of this action.

Without discussing the mechanical questions of how plaintiffs' proposal would eliminate the expense, I can simply say that in my view, plaintiffs' proposal would involve an arbitrary reduction in the class. If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares.

Moreover, with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense.

V.

Plaintiffs propose to include in the class all persons who purchased Fund shares from March 15, 1968 (the date of the first allegedly false prospectus referred to) to April 24, 1970 (the date of the prospectus in which, according to plaintiffs, defendant first fully described the method used by the Fund in valuing restricted securities in the Fund's portfolio).

Defendants have no objection to the March 15, 1968 starting date, but contend that the class period should be cut off at April 25, 1969, the date of a prospectus that defendants claim disclosed to the public the pendency of these law suits and the allegations of non-disclosure made by plaintiffs here.

I conclude there is a triable claim that the disclosure in the April 25, 1969 prospectus was not adequate. The 1969 prospectus does indeed inform the reader of the pendency of this and other law suits. It does state that the suits call the valuation of restricted securities into question. It further states that in the opinion of management the suits are "meritless." On valuation of restricted securities in particular the 1969 prospectus states that restricted securities are valued at "fair value as determined in good faith by the Board of Directors." However, nowhere in the April 25, 1969 prospectus is there an explicit statement of how the Board of Directors arrives at a valuation for the shares.

The April 24, 1970 prospectus is substantially different. In addition to the almost identical references to the present litigation and to the fact that the Board of Directors values the restricted securities, there is an entire page which specifically sets forth the method used in valuing these securities.

I therefore conclude that the class may properly include persons who bought fund shares through April 24, 1970.

This finding does not, of course, determine the merits of plaintiffs' allegations. The materiality of the information plaintiffs claim should have been disclosed as well as the market effect of its disclosure or non-disclosure are questions to be litigated.

VI.

Plaintiffs are seeking to minimize their expenses in connection with giving notice to the members of the class. As indicated earlier, their proposal is to limit the class to Fund shareholders who bought in the relevant period and who still own their shares, *excluding* shareholders who have sold their shares.

Plaintiffs further propose that the giving of notice should be accomplished by having the Fund insert the notice in a regular mailing to its present shareholders.

Defendants raise two objections to these proposals. One objection has already been described and dealt with—that the proposal would cut out of the class approximately 18,000 persons who logically belong in the class. Earlier in this opinion, I stated my ruling in favor of defendants on this point.

The second objection of defendants is that the insertion of the notice in a regular mailing to the current Fund shareholders would result in the notice being sent to numbers of shareholders who are not members of the class. My solution to this problem starts with my earlier ruling that it is the responsibility of defendants to cull out from their records a list of all class members and provide this list to plaintiffs. Plaintiffs will then have the responsibility to prepare the necessary notice and mail it at their expense.

The parties should settle an order on this opinion, and should submit a form of notice to be given to the members of the class.

Dated: New York, New York
May 15, 1975

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

APPENDIX B

District Court Memorandum Order

UNITED STATES DISTRICT COURT
Southern District of New York
69 Civ. 1242

Irving Sanders,
Plaintiff,
v.
Leon Levy, et al.,
Defendants.

Egon Taussig,
Plaintiff,
v.
Sidney M. Robbins, et al.,
Defendants.

Michael Shaev and Rita Shaev,
Plaintiffs,
v.
Eric Hauser, et al.,
Defendants.

Griesa, *J.*

Motions for reargument of my May 15, 1975 opinion have been made by plaintiffs and by various defendants. All such motions are denied, except as follows:

Appendix B

(1) The starting date for the period for the class claims should be March 28, 1968 instead of March 15, 1968.

(2) The cost of culling out the list of class members shall be borne by defendant Oppenheimer Fund, Inc., without prejudice to the right of this defendant, at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party.

(3) As to the mailing of notices, plaintiffs are to have the option of (a) sending them out in their own mailing; or (b) including them in a regular mailing of defendant Oppenheimer Fund, Inc., provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra costs of mailing, including the costs of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders.

So ordered.

Dated: New York, New York
September 30, 1975

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

APPENDIX C

Court of Appeals Three-Judge Panel Opinion

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 743, 744, 745—September Term, 1975.

(Argued May 5, 1976 Decided June 30, 1976.)

Docket Nos. 75-7608, 75-7610, 75-7611

Irving Sanders,
Plaintiff-Appellee,
—against—
Leon Levy, et al.,
Defendants-Appellants.

Egon Taussig,
Plaintiff-Appellee,
—against—
Sidney M. Robbins, et al.,
Defendants-Appellants.

Michael Shaev and Rita Shaev,
Plaintiffs-Appellees,
—against—
Eric Hauser, et al.,
Defendants-Appellants.

Before:

HAYS and MULLIGAN, *Circuit Judges,* and
PALMIERI, *District Judge.**

Appeal from an order of the Hon. Thomas F. Griesa, *Judge,* United States District Court for the Southern District of New York, holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing that the defendant mutual investment fund bear substantial costs of extracting the names and addresses of the class members from computer tapes.

Affirmed as to class action designation. Reversed as to allocation of identification costs.

GERALD GORDON, New York, New York (Weisman, Celler, Spett, Modlin & Wertheimer, New York, New York, Milton C. Weisman, of Counsel), *for Defendant-Appellant Oppenheimer Fund, Inc.*

LEON H. TYKULSKER, New York, New York (Guggenheimer & Untermyer, New York, New York, Richard P. Ackerman, of Counsel), *for Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.*

JOHN F. DAVIDSON, New York, New York (Thacher, Proffitt & Wood, New York, New York, Daniel E. Kirsch, of Counsel), *for Defendants-Appellants Edmund T. Delaney and Emanuel Celler.*

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* Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

DONALD N. RUBY New York, New York (Wolf Popper Ross Wolf & Jones, New York, New York, Robert Kornreich, of Counsel), *for Plaintiffs-Appellees.*

PALMIERI, *D.J.:*

Plaintiffs-appellees (plaintiffs) seek to maintain this action on behalf of certain present and former stockholders of Oppenheimer Fund, Inc. (the Fund), an investment company registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* This is an appeal under 28 U.S.C. § 1291 from an interlocutory order holding the suit to be properly maintainable as a class action under Rule 23(b)(3), Fed. R. Civ. P., and directing the defendant-appellant (defendant) Fund to bear substantial costs in identifying the names and addresses of the class members so that plaintiffs can send them the initial notice of the pending action as required by Rule 23(c)(2), Fed. R. Civ. P.

When the motion for class determination was made, there were over 67 million shares of the Fund outstanding held by approximately 173,000 shareholders. Of the approximately 121,000 present or former shareholders who constitute the class designated by the plaintiffs, about 103,000 remain shareholders and 18,000 have sold their shares. The information needed by plaintiffs for the preparation of the notice to the members of the class, particularly the names and addresses of the class members, is contained in magnetic computer tapes kept by the transfer agent of the Fund. The extraction of this information from the tapes would require, in addition to the usual processing, the design of new computer programs. The cost of accomplishing this task was estimated by the transfer agent to be $16,580 as of October 10, 1973.

On each of the issues presented, identification costs and designation as a manageable class action, we must first decide if the issue is reviewable on appeal and, if so, then determine if the district court's decision should be upheld. Since we find that our treatment of the identification costs matter affects the designation question, we discuss the identification costs matter first.

The Allocation of Identification Costs

The order requiring the Fund to bear the identification costs is appealable because it fits squarely within the collateral order doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). The requirements of that doctrine are essentially twofold: first, the decision appealed from must not be "tentative, informal or incomplete," 337 U.S. at 546, but rather it must conclusively settle a party's claim; second, the decision must involve a collateral matter that can be reviewed apart from the merits of the case but which cannot be effectively reviewed on appeal from the final judgment. In *Eisen* v. *Carlisle & Jacqueline (Eisen IV)*, 417 U.S. 156 (1974), the Supreme Court faced the question whether this court had jurisdiction in *Eisen* v. *Carlisle & Jacquelin (Eisen III)*, 479 F.2d 1005 (2d Cir. 1973) when we reviewed the district court's order imposing notice costs on the defendants. The Supreme Court decided that the order was appealable because it was " 'a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.' " 417 U.S. at 172, *quoting Cohen, supra,* 337 U.S. at 546-47. *See also, General Motors Corp.* v. *City of New York,* 501 F.2d 639, 647 (2d Cir. 1974). We find this question of appealability controlled by *Eisen IV.*

We turn next to the merits of the order allocating identification costs. Rule 23(c)(2), Fed. R. Civ. P., provides in relevant part:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Since this is a class action brought under subdivision (b)(3) of the rule, namely, one in which the court below found that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that the class action was superior to other available methods, individual notice of the action must be sent to all class members who can be identified by name and address through a reasonable effort. *Eisen IV,* 417 U.S. at 173-77. The cost of such notice must be borne in the first instance by plaintiff. *Id.,* 417 U.S. at 177-79; *Eisen III,* 479 F.2d 1005, 1009 (2d Cir. 1973); *Eisen II,* 391 F.2d 555, 568 (2d Cir. 1968). The authorities just cited enunciate the views of the Supreme Court and this court that, absent special circumstances, if the plaintiff does not accept this expense, the class action cannot be maintained. In the usual case, defendants may not be compelled to provide financial support for a class action against themselves.

> Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost

> of notice as a part of the ordinary burden of financing his own suit.

Eisen IV, 417 U.S. at 178-79.

The possibility that plaintiff may not be required to defray the cost of notice is still an open question in some cases. The Supreme Court declined to foreclose the possibility in "situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit." *Eisen IV, supra,* 417 U.S. at 178. In addition to the derivative suit, we have suggested that there may be other similar cases in which justification might be found for holding that a representative plaintiff is not obligated to defray the cost of notice, citing "a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund." *Eisen III,* 479 F.2d 1005, 1009 n.5 (2d Cir. 1973). The district judge does not appear to have pursued this line of analysis and the plaintiffs have mentioned it only in passing.

Assuming that there may be cases where the imposition of notification costs on the defendant may be justified, we *do* not think this is such a case. The defendant Fund is not a public service monopoly with the responsibilities incumbent upon such an entity, and no finding of liability has yet been entered against it. The Supreme Court in *Eisen IV* did not attempt to elucidate the exceptional case in which a representative plaintiff might be relieved of this burden. Indeed, it did not unequivocally state that there was such a case. It did speak of the shareholder derivative suit but that apparently was by way of analogy since the derivative suit is not a class action, though possibly akin thereto.[1] The Supreme Court also described *Eisen IV* as a case where "the relationship between the parties is truly adversary." 417 U.S. at 178. Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests closely aligned with the plaintiff and indeed would be the beneficiary of any recovery. The equities in favor of imposing some costs on the corporation in that situation are obvious. But the Supreme Court more likely had in mind an arms-length relationship unencumbered by fiduciary duties. The relationship between the plaintiffs and the Fund is probably not "truly adversary" in the *Eisen IV* sense. Although the Fund is not in the position of the corporation in a derivative suit,[2] we may assume it had fiduciary duties to the purchasers of its shares. See *Dolgow v. Anderson,* 43 F.R.D. 472, 498-99 (E.D.N.Y. 1968). But the relationship between the plaintiffs and the Fund is not non-adversarial in a manner which requires an exception to the *Eisen IV* rule on notification costs, but in a manner that makes it totally improper to impose costs on the Fund: the Fund is not a party to the class action claims.[3] No

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[1] See *Developments in the Law, Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 943 (1958); Meyer, *The Social Utility of Class Actions,* 42 BROOKLYN L. REV. 189, 190-91 (1975).

[2] Each of the three consolidated suits contains two counts—one a derivative and one a class action. The order on appeal deals only with the latter, and we are not here concerned with the derivative claims. Furthermore, the Fund would not directly benefit from a recovery by the plaintiffs.

[3] The dissent apparently overlooks the fact that the costs were imposed on the Fund which is not a party to the class action claims. *Eisen IV, supra* at 178, makes an exception to the usual rule that the representative plaintiff must bear the cost of notice "where a fiduciary duty pre-existed between the *plaintiff* and *defendant* . . ." (emphasis added). We may not assume that non-class member shareholders would approve of the Fund underwriting these expenses for the benefit of other shareholders.

recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrong-doing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here. Since the Fund has no direct interest in the outcome of the class action claim, it is too remotely involved to have notification costs imposed upon it.

Furthermore, we do not think these costs could properly be imposed on the other defendants. Even if we assume that these defendants—the directors of the Fund, its manager, and the firm that controlled the manager—had fiduciary duties to the plaintiff shareholders, that would be insufficient in our opinion to warrant imposition of notification costs on them on the facts of this case. Many of the considerations pointed to in justification for shifting the costs, see *Dolgow* v. *Anderson, supra,* 43 F.R.D. at 498-500; *Eisen* v. *Carlisle & Jacquelin,* 52 F.R.D. 253, 264-70 (S.D.N.Y. 1971), have been shown to be inappropriate. The district court may not weigh the merits and cite the strength of a plaintiff's case as justification.[4]

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[4] We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Eisen IV, supra, 417 U.S. at 177. We have stated the matter more broadly:

> But neither in amended Rule 23 nor in any other rule do we find provision for any tentative, provisional or other makeshift determination of the issues of any case on the merits for the avowed purpose of deciding a collateral matter such as which party is to be required to pay for mailing, publishing or otherwise giving any notice required by law.

Eisen III, supra, 479 F.2d at 1015.

The result in *Eisen IV* leaves no doubt that the ability of a defendant to bear the costs and the fact that, if it does not, the suit will have to be discontinued, are to be given little or no weight. The public interest in enabling the adjudication of claims that could not be maintained in any other form and in having remedial statutes enforced is sharply offset by the danger, all too frequently realized, of large settlements paid irrespective of the merits of the claim in order to avoid the disastrous expenses of litigation. *Eisen III, supra,* 479 F.2d at 1019. Even the contention that the defendant has an interest in obtaining the effects of res judicata against all members of the class often rings untrue. If the class action proceeds, the defendant may pay large sums in defending claims that might not otherwise have been brought due to the limited interest of the individual plaintiffs.[5] In sum, we perceive no special circumstances in this case that would warrant shifting the costs of notification from the plaintiffs to any of the defendants. We have suggested before that the vindication of valid class claims not maintainable under Rule 23(b)(3) or otherwise is a matter for Congress. *Eisen III,* 479 F.2d at 1019.

The justification that the district court found for imposing some costs on the defendant Fund was twofold. First, it found the expense was "relatively modest," apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen*

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[5] *See* Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement,* 29 Md. L. Rev. 139, 155 (1969). This is true of the instant case where the interests of the class members are said to range from $2.00 to $24.00.

IV. The second reason given was that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." This bears some analysis. Plaintiffs defined the class as all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970. Discovery then revealed that this class consisted of approximately 121,000 persons, 103,000 of whom were still Fund shareholders, and that the cost of the required computer operations to extract the names and addresses of the class members from the lists of past and present Fund shareholders would be approximately $16,580. Plaintiffs then sought to redefine the class to exclude the 18,000 persons included in the original class who no longer hold Fund shares, and to send the required notice by inserting it in a regular mailing to all present Fund shareholders. The defendants objected to the exclusion of the 18,000 persons, presumably because it would limit the res judicata effect of the suit. The district court reached the same conclusion but for a different reason, holding that these persons could not be excluded because to do so "would involve an arbitrary reduction in the class."[6] The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct.

The defendants also opposed sending the notice to the 68,000 shareholders who are not class members, expressing concern that such a mailing could lower investor confidence and trigger a wave of redemptions. The district court did not pass on the validity of this concern; it merely noted that the concern was obviated by having the defendant cull the non-members from the lists. However, there is evidence in the record to substantiate the concern. Plaintiffs assert that the Fund shareholders have been advised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports. But we think that notice of that type—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the plaintiffs, giving a detailed explanation of the claims and without a denial of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct. In these circumstances, we think that the defendants concern was legitimate and the district court could not properly condition its abatement on defendants' shouldering of the notice costs. The identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants.

Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. They further suggest that identification costs are akin to the expense borne in discovery which a district judge may in his discretion require a party to bear unless the party can show that it is unreasonable and oppressive, citing, ***inter alia,*** 8 C. Wright & A. Miller, ***Federal Practice and Procedure,*** § 2218 at 659 (1970), and 4A J. Moore, ***Moore's Federal Practice*** ¶ 33.20 (2d ed. 1975). However, we are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes. Moreover, if the rules of discovery were applicable, it appears unlikely that they would require that defendants bear the identification costs here. Rule 33(c), Fed. R. Civ. P., designed to protect parties from burdensome interrogatories, provides:

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[6] The court found: "If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares."

> (c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Under this rule, a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery. *See* 4A J. Moore, *Moore's Federal Practice* ¶ 33.20 at 33-103 (2d ed. 1975); *Tytel* v. *Richardson-Merrell, Inc.*, 37 F.R.D. 351 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures, Inc.*, 20 F.R.D. 588 (S.D.N.Y. 1957). If the discoverer should proceed under one of the other rules governing discovery, the respondent could obtain a protective order under Rule 26(c) from "undue burden or expense." Nevertheless, we do not rely on this point since we find the discovery rules inapplicable.[7]

The Class Action Designation

We turn next to the designation of the suit as a class action. The determination of the district court that the action met the requirements of Rule 23(b)(3) was discretionary. It is not appealable under the collateral order doctrine. In seeking to arrive at some standards by which to determine the appealability of such an order, we have developed a three-pronged test as set forth in *Herbst* v. *International Telephone & Telegraph Corp.*, 495 F.2d 1308, 1312 (2d Cir. 1974), and refined in *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974), *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974) and, most recently, in *Parkinson* v. *April Industries Inc.*, 520 F.2d 650 (2d Cir. 1975). *See also, Handwerger* v. *Ginsberg*, 519 F.2d 1339 (2d Cir. 1975). In *Parkinson*, we recognized the "renewed emphasis on the policies of finality" and indicated that only in "extraordinary circumstances" would exceptions to the final judgment rule be permitted. 520 F.2d at 657-58. Although it may be a close question whether that three-prong test is satisfied here, we do not decide that question. We think we may properly review the class action designation because the order in which it was made is properly before us on another ground. Judge Friendly, in his concurrence in *Parkinson, supra*, 520 F.2d at 660, suggested that this exception should be made even if appeals from the grant or denial of class action designation are allowed only under the certification procedures of 28 U.S.C. § 1292(b). There is sufficient overlap in the factors relevant to both issues to warrant our exercising plenary authority over this appeal. *Eisen IV, supra*, 417 U.S. at 172; *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966). *See San Filippo* v. *United Bhd. of Carpenters & Joiners*, 525 F.2d 508 (2d Cir. 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 648 (2d Cir. 1974); 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 272-73 (2d ed. 1975).

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[7] Our dissenting Brother sees Rule 34 as "more specifically designed to govern computerized information." This rule addresses itself to the *production* of data compilations for inspection or copying, not to the sorting or analysis of the data. Although the rule provides that the data compilation may be "translated, if necessary, by the respondent through detection devices into reasonably usable form," the concern appears to focus on putting the data into a form intelligible to the discoverer so he can then study or employ it. As the Advisory Committee Note to the 1970 amendment states,

> "[W]hen the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a *print-out* of computer data."

48 F.R.D. at 527 (emphasis added). The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If "sophisticated electronic manipulation and analysis" become necessary, "the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970).

Turning to the merits of the class action designation we find that the granting of class action status was proper. As Judge Griesa found, the requisite numerousness is present and common questions of law and fact predominate over any questions affecting only the individual members of the class. Moreover, we cannot, at this stage of the litigation, support defendants' claim of unmanageability. They contend that proof of liability and damages "may well involve millions of individual computations," and that the aggregate damages sustained by the class may not be great as plaintiffs claim. Nevertheless, the district judge is in the best position to make a determination of manageability and has considerable discretion in doing so. Modern computer technology can bring formerly insurmountable tasks within the range of manageability. If, on the other hand, unmanageability should develop or facts should arise which indicate that class treatment is inappropriate, the district judge can reassess the procedures to be employed and can even reconsider the class action designation. *Parkinson* v. *April Industries, Inc., supra*, 520 F.2d at 653; *General Motors Corp.* v. *City of New York, supra*, 501 F.2d at 647; *Green* v. *Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Rule 23(c)(1), Fed. R. Civ. P. Judge Griesa specifically noted that his determination was a provisional one.

Accordingly, we affirm the provisional designation of the suit as a class action but reverse the order imposing on the defendant Fund the costs of extracting from computer tapes the names and addresses of the class members.

HAYS, *Circuit Judge* (dissenting in part):

I concur in the majority's holding that the order below is appealable and the granting of class action status proper. I respectfully dissent, however, from the reversal of the district court order directing defendant Oppenheimer Fund, Inc. ("the Fund") to cull out the names of class members from the Fund's computer tapes at the Fund's expense. The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin (Eisen IV)*, 417 U.S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arms-length relationships to the fiduciary relationship between the parties herein. An elaboration of the particular facts attending this suit is fundamental to understanding the nature of the action and my disagreement with the panel's holding.

Defendant Fund is an open-end diversified investment fund registered under the Investment Company Act of 1940, 15 U.S.C. §§80a-1 *et seq.* Defendant Oppenheimer Management Corporation ("the Manager") manages the Fund's investment portfolio and, pursuant to an Investment Advisory Agreement, receives compensation calculated as a percentage of the Fund's net asset value. Defendant Oppenheimer & Co. ("the Broker") is a brokerage firm owning approximately 82% of the outstanding stock of the Manager and 100% of the voting stock. The individual defendants are all directors of the Fund, some of whom also hold offices or directorships or partnership interests in the Manager and/or Broker. The Manager has the right to act as exclusive distributor and sole principle underwriter of Fund shares. Shares are sold to the public at a price equal to net asset value plus a sales charge.

This consolidated suit involves stockholder derivative and class action claims. The class, as certified by the district court, is composed of all persons who purchased Fund shares between March 28, 1968 and April 24, 1970. The complaint alleges that the defendants violated the federal securities laws by failing to disclose material information to investors. The gravamen of the damage claims is that restricted securities purchased by the Fund were overvalued and, consequently, the net asset value of the Fund was overstated. Overstatement of net asset value, in turn, caused an overvaluation of Fund shares being sold to the public during the relevant period and, because the Fund-Manager fee arrangement was geared to net asset value, caused the Fund to pay inflated fees to the Manager.

As the majority apparently recognizes, the Supreme Court's *Eisen IV* decision is not dispositive of the issue of the allocation of costs of identification in the context herein. *Eisen IV* construed the *notice* requirements of Rule 23(c)(2), which apply to class actions maintained under Rule 23(b)(3), in the context of a case wherein "the relationship between the parties is truly adversary," *Eisen IV*, *supra* at 178-79, and held that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class." *Id.* at 178. In the instant case, in contrast, we deal not with notice costs—a burden plaintiffs herein willingly assume—but with class member identification costs, and we deal not with the usual rule applicable to truly adversarial relationships, but with a rule as to which the Supreme Court took pains to express no opinion—the rule which governs in "situations where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Id.* Both of these distinctions merit pause before we rush to close yet another door to the class action procedure.

In *Eisen IV* the Supreme Court held that in a Rule 23(b)(3) class action the cost of notice, *i.e.*, the letter, envelope, stuffing, and postage is, in the usual case, the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV*, *supra* at 179. The opinion properly construed requires only that the litigation expense of notice be borne by plaintiff. It does not require, and surely the Supreme Court did not intend, that *all* litigation expenses, contrary to established rules and practice, are to be hereinafter the plaintiff's responsibility. When identification is sought information allowing a party to proceed with his suit is at the core of the request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery.

Rule 34 governs the production of computerized information, making discoverable, *inter alia,* "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. . . ."[1] As noted by 8 C. Wright and A. Miller, Federal Practice and Procedure §2218 at 659 (1970):

> "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.'" (footnote omitted)

While the authors suggest that courts should be sensitive to the expense involved since the disclosing party may

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[1] It is somewhat disingenuous to focus, as the majority does, on Rule 33 which governs interrogatories rather than the Rule more specifically designed to govern computerized information. Since the disclosing party has opted to keep his records on computer tapes, there is good reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny.

be obliged "to engage in fairly sophisticated electronic manipulation and analysis," *id.,* expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an "undue burden or expense." It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker* v. *F&F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories,* 384 F.2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, *cf. Eisen IV, supra* at 179, n.16, did not commit reversible error in refusing to shift this burden to plaintiffs. Moreover, the order below specifically notes that it is "without prejudice to the right of this defendant [the Fund], at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party."

Assuming, *arguendo,* that the majority is correct in failing to distinguish identification from notice, reversal of the district order is neither compelled by *Eisen IV* nor an advisable extension of that case. As we noted in *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1009 n.5 (2d Cir. 1973)[2] *("Eisen III")* and the Supreme Court noted in

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[2] The footnote, in pertinent part, states:

> "Nor did we decide or intend to say [in *Eisen II,* 391 F.2d 555 (2d Cir. 1968)] that in all cases or under all circumstances

Eisen IV, the usual rule that the representative plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and defendant. . . ." *Eisen IV, supra* at 178. The instant appeal squarely raises the issue, heretofore undecided, of whether notice costs may properly be imposed upon a defendant when the relationship of the parties is truly fiduciary. I would hold that they may.

Unquestionably the relationship between Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act "impose[s] fiduciary obligations of the highest order upon persons who control investment companies." *Securities and Exchange Commission* v. *Advance Growth Capital Corp.,* 470 F.2d 40, 55 n.21 (7th Cir. 1972). *See,* Investment Company Act of 1940, 15 U.S.C. §80a-35. So too, "[t]he Investment Advisors Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship. . . .'" *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit.

When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty. Thus, as the majority notes, the Supreme Court in *Eisen* "refused to foreclose the possibility" of allocating notice costs where there exists a fiduciary duty between the parties and their relationship is not truly adversarial. Absent such a special relationship and without support under Rule 23, the Supreme Court found no justification for deviating from the usual rule that a plaintiff must bear notice costs. In cases involving fiduciaries, however, the usual rules traditionally have been modified to insure that the trust relationship is not abused. The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress. I wōuld affirm the district court.

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plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration. It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. See Advisory Committee's Note, 39 F.R.D. 69, 107."

APPENDIX D

Order Granting Rehearing En Banc

UNITED STATES COURT OF APPEALS

For the Second Circuit

75-7608

Irving Sanders, et al.,

Plaintiffs-Appellees,

v.

Leon Levy, et al.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed by counsel for the appellees, a majority of the court has voted to grant reconsideration en banc. The court does not deem oral argument necessary, but directs that additional briefs be filed, as follows:

Appellants' brief:	October 5, 1976
Appellees' brief:	October 19, 1976
Appellants' reply brief.	October 22, 1976

The case will be deemed submitted on October 22, 1976.

The en banc court will consist of the members of this court in active service together with Judge Hays, a Senior Judge who was a member of the original panel.

/s/ Irving R. Kaufman
Irving R. Kaufman,
Chief Judge

Dated: September 14, 1976

APPENDIX E

Court of Appeals En Banc Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1492, 1493, 1494—September Term, 1976.

(Submitted October 22, 1976 Decided June 22, 1977.)

Docket Nos. 75-7608, 75-7610, 75-7611

IRVING SANDERS,
Plaintiff-Appellee,
—against—
LEON LEVY, *et al.*,
Defendants-Appellants.

EGON TAUSSIG,
Plaintiff-Appellee,
—against—
SIDNEY M. ROBBINS, *et al.*,
Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs-Appellees,
—against—
ERIC HAUSER, *et al.*,
Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,* and
HAYS, FEINBERG, MANSFIELD, MULLIGAN, OAKES, TIMBERS, GURFEIN, VAN GRAAFEILAND, and MESKILL, *Circuit Judges.*

On rehearing en banc

Appeal from an order of the United States District Court for the Southern District of New York, Griesa, *J.*, holding the suit to be maintainable as a class action pursuant to Rule 23 (b) (3), Fed. R. Civ. P., and directing the defendant mutual investment fund to cull names and addresses of class members from its computerized records. On rehearing en banc, the Court of Appeals held that the district court acted within its discretion in ordering defendant mutual fund to extract the names and addresses of class members at its own expense.

Affirmed.

Judges Mulligan, Van Graafeiland and Meskill dissent.

MILTON C. WEISMAN and GERALD GORDON, New York City (Weisman, Celler, Spett, Modlin, Wertheimer & Schlesinger, New York City, on the brief), *for Defendant-Appellant Oppenheimer Fund, Inc.*

LEON H. TYKULSKER and RICHARD P. ACKERMAN, New York City (Guggenheimer & Untermyer, New York City, on the brief), *for Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.*

JOHN F. DAVIDSON and DANIEL E. KIRSCH, New York City (Thacher, Proffitt & Wood, New York City, on the brief), *for Defendants-Appellants Edmund T. Delaney and Emanuel Celler.*

DONALD N. RUBY, ROBERT KORNREICH and MARIAN R. PROBST, New York City (Wolf, Popper, Ross, Wolf & Jones, New York City, on the brief), *for Plaintiffs-Appellees.*

SAMUEL E. GATES, JOHN C. ELAM, PETER J. HOLME, JR., RICHARD J. MACLAURY, RALPH L. MCAFEE, DON H. REUBEN, CARL J. SCHUCK, MARVIN SCHWARTZ, WILLIAM SIMON and GEORGE A. SPIEGELBERG, New York City, *for amicus curiae American College of Trial Lawyers urging reversal.*

HAYS, *Circuit Judge:*

Upon this rehearing en banc we are confronted with the novel question whether, under the Federal Rules of Civil Procedure, the district court was empowered to order a defendant at its own expense to cull from its computerized records the names and addresses of the members of the class represented by plaintiffs. We hold that the district court was possessed of discretion to require the production of the list which plaintiffs demand in order to meet their obligations under Rule 23(c)(2), *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) (*Eisen IV*), of providing individualized notice to the members of the class. On the record before us, the district court did not abuse its discretion.

The defendant Oppenheimer Fund, Inc., which was required by the district court to produce the names and addresses of the members of the class, is an "open-end" investment company registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* Shares of the fund are sold to the public at prices reflecting the current value of the fund's assets plus a service charge; shareholders of the fund are free to liquidate their interests by exchanging their shares for a sum determined to represent their proportionate share of the fund's net assets. The roster of shareholders, who number well over 100,000, is of course constantly changing. It scarcely need be said that the computer plays an integral role in the operations of the fund; indeed, in the absence of computer technology, operations so vast and complex as those of the fund might well be impossible to conduct.

The defendant Oppenheimer Management Corporation is the investment adviser which manages the fund's investment portfolio. All of the voting stock of the investment adviser is owned by the defendant Oppenheimer & Co. Individual defendants are directors of Oppenheimer Fund; some of the individual defendants, in addition to occupying directorships in the fund, are officers, directors, or partners of Oppenheimer & Co. or the Oppenheimer Management Corporation.

The plaintiffs are shareholders of the fund. The essence of their complaint is that defendants overvalued restricted securities purchased by the fund; the overvaluation of the fund's assets is alleged in turn to have caused the inflation of the prices at which plaintiffs purchased shares in the fund and to have caused overpayments to the fund's manager, defendant Oppenheimer Management Corporation, whose fees are computed as a percentage of the net asset value of the fund's portfolio.

In their initial motion for class determination pursuant to Rule 23(c)(1), plaintiffs sought to represent all who purchased shares of the fund between March 28, 1968, and April 24, 1970. After this Court's holding in *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), *aff'd,* 417 U.S. 156 (1974) (*Eisen IV*), plaintiffs sought a redefinition of the class to exclude those who had sold their shares in the fund. Plaintiffs hoped thus to reduce the cost of the individualized notice to class members which *Eisen III* and *Eisen IV* required plaintiffs to bear, by including the notice in a regular mailing by the fund to its shareholders. At the time when plaintiffs requested the modified class determination, there were approximately 171,000 shareholders of the fund, 103,000 of whom had purchased their shares during the class period; those who had purchased during the class period and subsequently sold their shares—and thus would have been excluded from the class if plaintiffs' proposed modification had been accepted—numbered some 18,000. The defendants opposed the class modification, preferring the broader class definition. By its order, the district court rejected plaintiffs' proposed redefinition of the class and directed that notice be effected by a separate mailing to all class members. Thus to notify a class so defined will cost the plaintiffs $20,000, in comparison to the $5,000 expense which their proposed class definition and method of notice would have entailed. The district court, however, required the fund to shoulder the expense, about $16,000, of extracting from its computerized records the list of the names and addresses of the class members. Defendants appeal from the district court's order insofar as it determined that the lawsuit was properly maintainable as a class action and that defendants should, at their own expense, provide the plaintiffs with the names and addresses of class members.

A panel of this Court determined that the district court's order was appealable and that the litigation was manageable as a class action. Nos. 75-7608, 75-7610, 75-7611 (2d Cir., June 30, 1976). We do not reconsider these aspects of the panel's decision, and we limit our discussion to the question, answered in the negative by the panel, whether defendants were properly required to bear the cost of furnishing plaintiffs with the list of class members.

Eisen IV held that Rule 23(c)(2), reflecting constitutional principles of due process, *see Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), commands that "individual notice must be provided to those class members who are identifiable through reasonable effort." 417 U.S. at 175. The Supreme Court further held in *Eisen IV* that the representative plaintiff was required to bear the cost of notice:

> "In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class. . . . [T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."

Id. at 178-79. The Court in *Eisen IV* had no occasion to consider which party would bear the cost of determining the names and addresses of those to whom the notice would be sent, because the plaintiff in *Eisen,* unlike the plaintiffs in the instant litigation, was unwilling to bear even the expense of printing and mailing the required notice.

Defendants argue that, since it is prerequisite to sending the notice mandated by *Eisen IV* that plaintiffs obtain the names and addresses of those to whom the notice will be sent, *Eisen* should govern the allocation of the cost of providing the information. We disagree. In *Eisen,* the plaintiff's effort to impose the costs of notice upon the defendants failed "[i]n the absence of any support under Rule 23." Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the fund, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records.

It hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery established by our Federal Rules. Under Rule 26, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed.R.Civ.P. 26(b)(1). The holding of ***Eisen IV*** itself propels us ineluctably to the conclusion that the names and addresses of class members are "relevant to the subject matter" of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. *See Appleton Electric Co.* v. *Advance United Expressways,* 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.,* 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972).

Under Rule 34(a), plaintiffs were entitled "to inspect and copy, any designated documents (including . . . data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) . . . ." Rule 34, therefore, provided ample basis for the district court's order compelling the defendant fund to produce from its computerized records the discoverable information concerning the names and addresses of the class members. The 1970 amendments to the Federal Rules rendered Rule 34 specifically applicable to the discovery of computerized information:

> "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data."

Advisory Committee Note, 48 F.R.D. 459, at 527 (1970).

Defendants argue, however, that because plaintiffs' requests for computerized information require the fund to devise, at a cost in excess of $16,000, a special computer program to extract the names of the class members, plaintiffs should be required to bear the added expense. We acknowledge that Rule 34, coupled with Rule 26(c), allows the district court to shift the expense of special computer programming to the discovering party where the demand for information would impose upon the respondent "undue burden or expense", but we hold that in the instant case the trial judge did not abuse his discretion in declining so to do.

Rule 33, which defendants contend would dictate a different result, is inapplicable. That Rule provides, in pertinent part:

> "(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

It may well be that where ordinary business records are concerned Rule 33 would generally require that the discovering party bear the expense of data compilation unless for special reason the compilation can be undertaken only by the respondent.[1] However, Rule 33(c) cannot derogate from the general command of Rule 34 that the respondent to a demand for computerized information produce a "reasonably usable" print-out of data contained in a computer's memory. Unlike Rule 34, Rule 33 was not especially tailored to the discovery problems posed by contemporary computer technology.

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[1] We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable.

Here, the demand for computerized information creates a necessity for special programming, entailing the substantial expenditure of $16,000 by the fund. Nonetheless, there is no warrant for applying an inflexible rule that the discovering party bear the expense. Computers, which in general make information more readily available, may occasionally make information more difficult to discover. Even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used. If the information demanded is such as the respondent might reasonably have expected to be required to make available for public examination or for use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming. In this and other respects, computer technology presents discovery problems with which the courts have developed relatively little familiarity.

The Rules do not leave the courts without power to avoid a litigant's unreasonable appropriation to himself of his opponent's computer resources. "[T]he courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs." Advisory Committee Note, *supra*, 48 F.R.D. at 527. *See also* Federal Judicial Center, Manual for Complex Litigation ¶ 2.715, at 152 (Tent. Draft July 21, 1976); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2218, at 658-59 (1970). However, the draftsmen of Rule 34 chose—wisely, in light of the relative judicial inexperience with the discovery problems posed by computer technology—not to burden discovery of computerized information with the more rigid principle of Rule 33(c). The existence of discretion pursuant to Rule 26(c) to reallocate the costs of discovery of computerized information in order to avoid abuse merely underlines the general rule: "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this." *Id.* at 659.[2]

The district court did not err in declining to exercise its discretion pursuant to Rule 26(c) to impose the costs of obtaining the computerized data upon the plaintiffs. Although compliance with the district court's order entails an expenditure by the fund in excess of $16,000, we cannot say the burden thus imposed is unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations. Although an expense of $16,000 seems large in absolute terms, the cost of identifying the name and address of each present or former shareholder who is a member of the class is only thirteen cents. Considering the extent of the fund's business, therefore, the burden of compliance with the Rule 34 discovery demand is not excessive. There is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple. Great corporations, for example, must expend millions to provide to the government information

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[2] Professors Wright and Miller note, "In many instances the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system." *Id.*

necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars. It is scarcely unreasonable, moreover, to demand of a respondent that he employ his computer resources to provide discoverable information of a relatively simple nature where, as here, the respondent makes extensive use of computers in the operation of its business.

The order of the district court allocating the costs of discovery of the computerized names and addresses of the class members was not unreasonable, moreover, in light of the district court's definition of the class. The plaintiffs sought to redefine the class to exclude former shareholders of the fund, so that the individualized notice mandated by *Eisen IV* could be inserted, at small expense, in one of the fund's regular mailings. The defendants opposed the class redefinition and the proposed method of notice on the grounds, respectively, that the more restrictive class definition would exclude potential class members as to whom the legal and factual issues would be similar to those raised by plaintiffs,[3] and that the proposed notice to all the fund's shareholders would prejudice the fund by notifying even those shareholders not involved in the litigation.[4] The district court rejected plaintiffs' proposed redefinition of the class. Plaintiffs, accordingly, are required to bear an expense of $20,000 to notify the class, in comparison to the $5,000 cost which plaintiffs had contemplated. But the district court declined to impose on plaintiffs the added cost of discovering the names and addresses of the class members, which cost was occasioned by the court's agreement with defendant that the fund would have been harmed by the proposed class redefinition. The considerations advanced by the defendant in opposition to plaintiffs' proposed class redefinition were undoubtedly entitled to some weight; still, they did not *require* the class definition ultimately accepted by the district court.[5] *See Eisen IV*, 417 U.S. at 179 n. 16 and *Eisen III*, 479 F.2d at 1023 (Oakes, *J.*, dissenting from denial of rehearing en banc) (raising possibility that class may be divided into subclasses pursuant to Rule 23(c)(4) so as to minimize cost of notice borne by representative plaintiff). *Cf. Eisen III*, 479 F.2d at 1009 n.5 (suggesting that notice may be included in regular mailing by defendant to class members). As such, we are not disposed to hold that the district court's refusal to impose on plaintiffs the cost of discovery of the computerized names and addresses was an abuse of its discretion. Indeed, the order of the district court accommodated the competing interests in a manner which was fair and imaginative.

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[3] Accordingly, defendants might have been bound by collateral estoppel if they lost on the merits, but, if the defendants won, they would not have been entitled to assert *res judicata* against the former shareholders who were not class members. *Compare Neaderland* v. *Commissioner*, 424 F.2d 639, 642 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970) (collateral estoppel), *with Saylor* v. *Lindsley*, 391 F.2d 965, 968 (2d Cir. 1968) (*res judicata*).

On the other hand, the issues presented might have been somewhat different for those who had sold their shares than for those who were still shareholders; the members of the former group might not have been damaged by the alleged overevaluation of the fund's net assets.

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[4] However, under Rule 23(c)(2) the district court could have supervised the form of notice included in one of the fund's regular mailings, so as to avoid undue prejudice to the fund. In any event, the fund has already notified its shareholders on many occasions of the pendency of this litigation.

[5] *See* notes 3-4 *supra*.

We note, finally, that our affirmance of the district court's order is without prejudice to a claim by the defendant fund for discretionary taxation of the cost of discovery against plaintiffs, should the plaintiffs ultimately lose. *See* 15 U.S.C. §§ 77k(e), 77ooo(e) and 78i(e); Fed. R. Civ. Pro. 54(d). If plaintiffs' suit proves frivolous, their attorneys might be held liable for the cost of discovery which, defendant fund is now required to bear. 28 U.S.C. § 1927. Plaintiffs have represented that they are unwilling to bear the cost of discovery of the names and addresses of the class members. However, their present unwillingness to pay this cost does not immunize them from a judgment for costs, nor does it necessarily diminish the deterrent effect of such a judgment against a strike suit.[6] The mere possibility that plaintiffs may prove to be judgment-proof does not affect our decision, since here, unlike in *Eisen*, there is a basis in the Federal Rules for imposition of the cost of discovery on the defendant fund. *Cf. Eisen III*, 479 F.2d at 1020 (Hays, *J.*, concurring).

Affirmed.

MULLIGAN, *Circuit Judge* (dissenting):

Ironically enough, the majority states that its holding is compelled by *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) *(Eisen IV)* and Rule 23(c)(2) although the Court in that case construed the rule to require the representative plaintiffs to pay the costs of notifying the prospective class of the pending action. The majority reaches this result by finding that the plaintiffs, who admittedly are only seeking the list of names and addresses of the potential plaintiff class in order to notify them of the pending action, are seeking instead a discovery which makes the cost allocable to the defendants in the discretion of the district court thus circumventing Rule 23 and *Eisen IV*. The majority then proceeds to find no abuse of discretion by the district court in foisting the special computer programming cost upon the defendant fund. Since the only purpose of obtaining the required information is to notify the class as mandated by Rule 23, *Eisen IV* compels the conclusion that the cost of such notification be borne initially, at least, by the plaintiffs. The majority forces the defendant to subsidize the suit against them, a result which is aberrant to our jurisprudence and to the extent that it depends upon the premise that the defendant has greater financial resources is further in conflict with *Eisen IV*. In sum, we believe Judge Palmieri's opinion for the panel properly disposed of the issue now before us en banc.[1]

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[6] The requirement that plaintiffs bear the $20,000 expense of notifying the class is itself a formidable deterrent to frivolous litigation, for, if plaintiffs lose, they cannot recover their disbursements.

I

In *Eisen IV* the Court stated, "The usual rule is that a plaintiff must initially bear the cost of notice to the class." Id. at 178. The majority does not claim that this

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[1] Hon. Edmund L. Palmieri, United States District Judge for the Southern District of New York, sat by designation on the original panel and was the author of the majority decision. Slip op. 4577 (2d Cir. June 30, 1976). Fed. R. App. P. 35, which provides for en bancs, makes no allowance for the participation of members of the original panel who are not judges of the Court of Appeals. Thus, Judge Palmieri has not participated in this en banc consideration.

case falls outside the usual rule.[2] Instead, the majority has decided that obtaining the names and addresses of the prospective class is not part of the notification process mandated by Rule 23(c)(2) but is rather within a discovery process governed by an amalgam of Rules 26(b)(1) and 34. As a matter of logic this is bewildering. The only purpose of the plaintiffs here in obtaining the data is to notify the class; it is an essential and unavoidable step in the notice giving process. As Judge Palmieri observed "the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes." Panel slip op. at 4587. The majority now creates in effect a bicephalous rule which is anomalous. The cost of printing, stuffing and postage of the notice *must* be borne by the plaintiffs but the cost of obtaining the names and addresses to put on the envelopes *may* be thrust upon the defendants in the discretion of the trial bench. As *Eisen IV* held, "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 179. We cannot appreciate how it can be reasonably held that the expense incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice.

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[2] In *Eisen IV* the Court noted that the district court in allocating the cost of notification between the parties had relied on cases where a fiduciary duty had pre-existed between the plaintiff and the defendant. While finding none in *Eisen IV* the Court expressed no opinion as to whether the usual rule would be followed in such cases. 417 U.S. at 178 n.15. Plaintiffs had argued before the panel that they were in a fiduciary position with the defendants and that therefore the possible loophole in *Eisen IV* applied. Judge Hays, dissenting in the panel opinion, espoused that position but it has been understandably abandoned in the en banc majority opinion.

The majority cites no authority at all for its novel position except to claim that the result is mandated by Rule 23 and *Eisen IV*. But Rule 23(c) requires the district court to direct "the best notice practicable under the circumstances, including *individual* notice to all members who *can be identified* through reasonable effort." (Emphasis supplied). This language would clearly indicate that the draftsmen of the rule made no distinction between the identification of the class and the notification of individual members. Notification posits identification which is an inseparable part of the process.

How then does *Eisen IV* compel a result which seemingly contradicts its holding? This is the crucial point in the majority holding since it is the basis for the determination that the discovery Rule 34 is applicable and not Rule 23. The majority finds that it "hardly requires our extended discussion" to establish that the list sought is within the scope of permissible discovery established by the rules. Its reasoning is as follows:

> Under Rule 26(b), "[p]arties may obtain discovery regarding any matter . . . relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are "relevant to the subject matter" of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses would of course be essential to the resolution of that issue.

This is an exercise in sophistry and not syllogistic reasoning. No one questions that Rule 23 mandates that the plaintiffs have the obligation to notify the class and the majority in that part of the opinion we have excerpted admits that a list of the names and addresses is an essential step in the required notification. How then can it avoid the holding of *Eisen IV* that such costs must be assumed by the plaintiffs? The *deus ex machina* employed is discovery under Rule 34. We do not maintain that discovery in class action cases is limited to the search for evidence or leads relevant to the substantive merits of the underlying controversy. It properly may encompass inquiry to determine whether class action requirements can be satisfied.[3] However, that was not the purpose of the plaintiffs here. The district court has certified the class and found that the action was properly maintainable as a class action. The panel unanimously agreed and no one in the en banc panel disagrees. There is no issue as to numerosity or a predominance of common questions of law or fact. The plaintiffs have never sought discovery relief under Rule 34. In the memoranda submitted by the plaintiffs to Judge Griesa prior to his opinion below there is no mention of Rule 34. Judge Griesa expressly and correctly perceived the issue as being "who is to bear certain expenses connected with the giving of notice." *Sanders* v. *Levy,* 69 Civ. 1242, Slip op. at 2 (S.D.N.Y. May 15, 1975).

No party here, certainly not the plaintiffs, is seeking "discovery" as a method of determining whether notice has "properly" been sent. Plaintiffs are not anticipating potential issues and seeking discovery to maintain a position. They were avowedly and quite simply seeking the list to notify the class under Rule 23. Should any issue arise as to "proper notification", e.g., was the list complete, was the notice appropriate, was the postage adequate, presumably it would be raised by a putative member of the class but not *in limine* by the plaintiffs who are required to notify and pay the costs of notification under *Eisen IV*.

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[3] See Annot., Discovery for Purposes of Determining Whether Class Action Requirements Under Rule 23(a) & (b) of Federal Rules of Civil Procedure Are Satisfied, 24 ALR Fed. 872 (1975). Here, of course, it has already been determined that the requirements for the class action have been satisfied.

The raw tape data from which the proper list can be ascertained is fully available to the plaintiffs. The only issue is who is to pay the expense of the special programming necessary to make it usable. The names and addresses which will be so produced will be equally accurate no matter who pays the cost. Since the obligation of proper notification is admittedly on the plaintiffs we cannot understand by what alchemy the majority decides that the cost becomes attributable to the defendant. We can only conclude that the majority while purporting to follow *Eisen IV* is in fact flouting its holding.[4]

II

Having decided that the notification required by Rule 23 has been somehow transmogrified by *Eisen IV* into a discovery procedure not governed by Rule 23, the majority proceeds to find no abuse of discretion in requiring the defendant fund to finance the suit against it, by relying

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[4] We note that in *Eisen IV* the petitioner's brief argued, "Subjecting Respondents to the cost of notice does not differ in effect from requiring parties to make substantial expenditures to comply with discovery orders . . . ." Petitioner's brief at 40-41. The same argument was advanced on oral argument before the Supreme Court, 42 U.S.L.W. 3493. The Court did not even dignify this argument by any discussion in its opinion.

on two factors which it finds persuasive. In rejecting the "inflexible" rule espoused by the Supreme Court, the majority then proceeds to impose its own by holding that there is no injustice in requiring one whose business is vast and complex to pay the substantial costs involved, while suggesting that the result might be different if the defendant's business was small and simple. But class actions for damages are invariably brought against those who are relatively opulent and affluent in comparison with the plaintiffs. This is inherent in the theory of the action. The impecunious or those of modest means are seldom if ever the target of such damage actions. The deeper pocket is invariably in the trousers of the defendant. This consideration moreover was expressly rejected in *Eisen IV* where the Court stated, "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176. The majority's attempt to transmute notification into discovery, as we have indicated, is totally unpersuasive.

The labored reasoning of the majority becomes evident in the analogy it draws. The majority argues that great corporations must expend millions to provide the government with information necessary to comply with the internal revenue laws. The information thus sought, however, is to determine whether there has been any violation of those laws and the retention of such records and data is imposed by those laws. But what law demands that the defendant maintain lists of past and present customers who might in the future band together to sue the corporation in some class whose perimeters will be fixed by the accidents and exigencies of possible litigation? There is no question that the information sought here has nothing to do with the merits of the underlying action. Nor is it relevant to determine whether the class action is properly maintainable. It is sought simply for notification purposes and not discovery in any sense in which that process has ever been defined. Moreover, the data is available if the plaintiffs are willing to assume the burdens, as well as the benefits, of the class action they have initiated. To require corporate defendants to so arrange their computer programming as to anticipate the endless variety of prospective classes which might some day bring class actions is, of course, unrealistic and not required by any law we know of until this decision which hopefully will be short lived.

The second consideration stressed by the majority is that when the plaintiffs sought to redefine by excluding some 18,000 investors the class they had initially selected, the defendants opposed the attempt. This resulted in a higher cost than would have resulted if the plaintiffs had been successful in reducing the class. Thus as the majority seems to view the matter, the defendant fund has somehow brought the burden of spending $16,580 at 1973 levels upon its own head. But the district court found that the exclusion of the 18,000 "would involve an arbitrary reduction in the class," since these people "logically belong in the class." *Sanders* v. *Levy*, 69 Civ. 1242, Slip op. at 7, 10 (S.D.N.Y. May 15, 1975). The determination of the scope of the class was on the merits. We cannot agree that by opposing an improper class a defendant thus becomes liable for any increased costs of notification. The class cannot become proper only if the defendant bears the cost of notifying the members. If this is to be the law the opportunities for abuse become obvious.[5]

The majority is not totally insensitive to the obvious inequity of requiring the defendant to finance the class action brought against it. It suggests that if the plaintiffs ultimately lose discretionary costs "might" be assessed against them. But this is unrealistic. The plaintiffs have consistently maintained that they cannot afford to pay the $16,580 costs entailed. Their average stake in the litigation is in the range of $2 to $24. The prospect of defendant obtaining reimbursement is dim indeed. The further suggestion that the costs may be recouped from counsel to the plaintiffs is admitted only as a possibility if the suit is found to be frivolous. If it is simply unsuccessful on the merits there is no hope at all of reimbursement. On the other hand, if the plaintiff class is successful there is no question that the prevailing parties will be entitled to costs, Fed. R. Civ. P. 54(a). Cost transference at this stage of the litigation therefore is hardly justified by the highly doubtful recoupment possibilities envisaged by the majority in derogation of the normal principles reiterated in *Eisen IV*.[6]

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[5] The majority does not make clear what weight the district court is to attribute to either the wealth factor or opposition-by-defendant-to-size-of-class factor in determining who should bear the cost. Is one factor sufficient or must both be present? It does seem clear that the court is limiting its holding to those cases involving computer technology and Rule 34 and not business records under Rule 33. We expect that until the Supreme Court intervenes, this court will be asked to further rule on this issue. The burden is not inconsiderable. There were 176 class actions filed in the Southern District of New York alone in fiscal 1976 and at the end of fiscal 1976, 408 class actions were pending in that district. There were 724 pending at that time in all the districts of this Circuit. Total filings of class actions in United States courts increased from 2,717 in 1974 to 3,584 in 1976 with 5,987 pending at the end of fiscal 1976. Administrative Office of the United States Courts, 1976 Annual Report of the Director 117-24.

[6] The imposition of the cost of giving notice upon the plaintiff has apparently not proved any great hindrance to class actions. See Note, The Rule 23(b)(3) Class Action: An Empirical Study,

Although responsible commentators have indicated that class actions for damages have in fact become a financial bonanza only for the attorneys and not for members of the class and have, in effect, converted the federal courts into small claims courts,[7] a burden not inconsiderable in days of overcrowded calendars and apparently not alleviated by *Eisen IV*, see notes 5 & 6, we do not rest our decision at all on that basis. Nor do we rest it on our recognition which is implicitly shared by the majority that strike suits may be encouraged by the added prospect of obtaining settlements of non-meritorious claims because of the increased cost of defending them. Rather we base our dissent on the ground that the costs involved here are unquestionably costs of notification which must be borne by the plaintiffs under Rule 23 and therefore are clearly within the rule of *Eisen IV*. The strained attempt to convert notification into Rule 34 discovery is conceptually unsound and unprecedented. We would therefore adhere to the well-reasoned opinion of Judge Palmieri for the panel.

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62 Geo. L.J. 1123, 1145-48 (1974); Developments in the Law—Class Actions, 89 Harv. L.R. 1319, 1434 n.223 (1976) as well as the statistics set forth in note 5 *supra*.

[7] *Free World Foreign Cars, Inc.* v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1970) (Weinfeld, *J.*); H. Friendly, Federal Jurisdiction: A General View 119-20 (1973). In this action the interests of the class members, as we have indicated, range from $2.00 to $24.00.

APPENDIX F

Statutes and Rules Involved

Federal Rules of Civil Procedure

Rule 23(a)-(d), 28 U.S.C., *Class Actions.*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

* * *

Rule 26(b)(1), (c), 28 U.S.C., *General Provisions Governing Discovery.*

* * *

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not priviliged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * *

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court

in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * *

Rule 33(c), 28 U.S.C., *Interrogatories to Parties.*

* * *

(c) *Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

• • •

Rule 34, 28 U.S.C., *Production of Documents And Things And Entry Upon Land For Inspection And Other Purposes.*

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Supreme Court, U. S.
FILED
DEC 15 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

—v.—

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1977

CERTIORARI GRANTED OCTOBER 31, 1977

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

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10-22-76	**Filed 25 copies reply brief, appellant, w/pfs (on rehearing) (Oppenheimer Fund, Inc)**
10-22-76	**Filed 25 copies reply brief, appellants, w/pfs (on rehearing) (Edmund T. Delaney and Emanuel Celler)**
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9- 6-77	**Filed notice of filing of petition for writ of certiorari (SC#77-335)**
11- 7-77	**Filed certified copy of order of Supreme Court granting petition for writ of certiorari (SC #77-335)**

Complaint

No. 69 Civ. 1242

UNITED STATES DISTRICT COURT
For the Southern District of New York

Irving Sanders,

Plaintiff,

—vs.—

Leon Levy, Jack Nash, Edmund T. Delaney, Emanuel Celler, Eric Hauser, Joseph M. McDaniel, Jr., Sidney M. Robbins, Oppenheimer Management Corporation, Oppenheimer & Company, and Oppenheimer Fund, Inc.,

Defendants.

Plaintiff by Wolf Popper Ross Wolf & Jones as attorneys for his complaint herein alleges upon information and belief, except as to Paragraph "1" which he alleges upon knowledge:

1. Plaintiff Irving Sanders made the following purchases of shares of Oppenheimer Fund, Inc., subsequent to March 15, 1968: 6.526 shares at a price of $7.24 per share on March 29, 1968; 5.657 shares at a price of $8.22 per share on May 1, 1968; 5.607 shares at a price of $8.56 per share on May 28, 1968; 4.196 shares at a price of $8.94 per share on June 21, 1968; 5.456 shares at a price of $8.66 per share on June 28, 1968; 5.72 shares at a price of $8.26 per share on July 30, 1968; 5.585 shares at a price of $8.46 per share on August 29, 1968; 5.059 shares at a price of $9.34 per share on September 27, 1968; 5.053 shares at a price of $9.35 per

share on October 31, 1968; 4.609 shares at a price of $10.09 per share on December 5, 1968; 4.817 shares at a price of $9.81 per share on January 3, 1969; and 4.984 shares at a price of $9.63 per share on January 29, 1969.

2. Plaintiff brings this action representatively on behalf of himself and all other persons similarly situated who purchased shares of Oppenheimer Fund, Inc. subsequent to March 15, 1968. The aforesaid purchasers of shares of Oppenheimer Fund, Inc. constitute a class so numerous that joinder of all members is impractical. There are questions of law or of fact common to the class. The claims of the plaintiff are typical of the claims of the class and the plaintiff will fairly and adequately protect the interests of the class.

3. The acts complained of herein constitute violations of Sections 12 (2) and 17 of the Securities Act of 1933 (15 U.S.C. §§ 77l and 77q, Section 10 (b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 promulgated thereunder by the Securities & Exchange Commission (17 CFR 240.10b-5), Sections 22, 30 and 37 of the Investment Company Act of 1940 (15 U.S.C. §§ 80a-22, 80a-29, and 80a-36) and Rules promulgated thereunder by the Securities & Exchange Commission. This Court has jurisdiction of this action under Section 27 of the Securities Exchange Act (15 U.S.C. § 78aa) Section 44 of the Investment Company Act (15 U.S.C. § 80a-43) Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331 and 1337). In addition, jurisdiction is based on the doctrine of pendent jurisdiction.

4. Oppenheimer Fund, Inc. (hereinafter referred to as the "Fund") is an open-end diversified investment company

of the management type, incorporated under the laws of the State of New York, with its principal place of business at 5 Hanover Square, New York, New York. The Fund is registered under the Investment Company Act of 1940. The shares of the Fund have been offered for sale and have been sold to the public on a continuous basis since March 15, 1968. The shares may be purchased at the public offering price which allegedly represents the net asset value of said shares plus a stated sales charge. As of December 31, 1968, there were 26,741,767 shares of the Fund issued and outstanding of which more than 5,000,000 shares were issued subsequent to March 15, 1968. Each share is entitled to one vote.

5. The individual defendants are the directors of the Fund.

6. Oppenheimer Management Corporation (hereinafter referred to as "Management Corporation") is a corporation organized under the laws of the State of New York with its principal place of business at 20 Exchange Place, New York, New York. The Management Corporations acts as an Investment Adviser to the Fund and as general distributor of the Fund shares.

7. Oppenheimer & Co. is a partnership organized under the laws of the State of New York, having its principal place of business at 5 Hanover Square, New York, New York. It is a member firm of the New York Stock Exchange. Oppenheimer & Co. owns approximately 82% of the outstanding stock of the Management Corporation including all of the voting stock of the Management Corporation. The remaining approximately 18% of the outstanding stock of the Management Corporation is owned by members of the

immediate families of certain partners or former partners of Oppenheimer & Co. who are not personally active in the business of the Management Corporation.

8. Oppenheimer & Co. is the largest holder of shares of the Fund. Oppenheimer & Co., its individual partners, the Management Corporation and the directors and officers of the Fund and their families own approximately 85,292 shares of the Fund. In addition, Oppenheimer & Co. own, of record, 13,032 shares as nominees for its clients.

9. All officers of the Fund are either partners or employees of the Management Corporation or Oppenheimer & Co.

10. Defendant Leon Levy, who is a director and president of the Fund, is a partner of Oppenheimer & Co. and a director of Oppenheimer Management Corporation. Defendant Jack Nash, who is a director of the Fund, is a partner of Oppenheimer & Co. and a vice-president and secretary of Oppenheimer Management Corporation. Defendant Edmund T. Delaney, who is a director of the Fund, is a partner in the law firm which is counsel for the Fund.

11. The Fund's investments are managed by the Management Corporation under the provisions of a management agreement between the Fund and the Management Corporation. The Fund pays a management fee to the Management Corporation which is divided into two parts: a basic fee based on net asset value plus a fee based on investment performance. The basic fee is payable monthly and is computed on the net asset value of the Fund as of the close of business each day. The performance fee is computed each year by comparing the prior year's performance of the Fund with the Standard & Poor's composite stock price

Index for 500 stocks for the same period. A performance fee will be paid to the Management Corporation when the Fund outperforms the Index. If the performance of the Fund does not equal the Index performance for the year, the Management Corporation must give the Fund a refund.

12. On or about March 15, 1968, the defendants (other than the Fund) directly and indirectly caused the Fund to file a prospectus for the sale of shares of the Fund and thereafter said defendants caused to be sold shares in the Fund by means of said prospectus dated March 15, 1968 and said prospectus, as revised, dated September 3, 1968, by the use of the mails and other instrumentalities in interstate commerce.

13. The aforesaid prospectus and said prospectus, as revised, were false and misleading in that they omitted or failed to state the following material facts which were necessary in order to make the statements, contained in said prospectus and said prospectus, as revised, in light of the circumstances under which they were made, not misleading:

A. That the Fund would invest in restricted securities which are commonly referred to as "letter of investment securities";

B. That the following special factors should be considered in connection with the purchase of restricted securities by the Fund:

1. The Fund will not be able to publicly sell its restricted securities without first registering them under the Securities Act of 1933.

2. To realize the benefit from the difference between the purchase price of restricted securities and the market price of freely marketable securities of the same class, such restricted securities must be sold to the public after registration under the Securities Act of 1933.

3. The process of preparing a registration statement for restricted securities and having it become effective under the Securities Act of 1933, may involve a considerable period of time.

4. A considerable period of time may elapse between the time a decision is made to sell restricted securities and the time when the sale may actually be made.

5. The Fund may be unable to sell restricted securities to the public when it wishes to do so because registration under the Securities Act of 1933 may not have become effective.

6. The Fund's decision to sell restricted securities may be based on factors other than strictly investment considerations and the Fund may be precluded from selling its securities at the most opportune time.

7. The Fund is likely to incur higher costs in the sale of restricted securities than would be incurred if such securities had been readily marketable.

8. The sale of restricted securities will in most cases require the service of an underwriter. As a result, in most cases the Fund will receive from the sale of restricted securities a net price below the market price of unrestricted securities of the same class.

9. Investment in restricted securities involves greater risk than investment in other securities.

14. Subsequent to March 15, 1968, the defendants directly and indirectly caused the Fund to purchase various restricted securities including the following: 50,000 shares of Unexcelled, Inc.; 28,000 shares of Trans-lux Corp.; 5,000 warrants of Saxon Paper Corp.; $1,000,000 of Saxon Industries Senior Subordinated Convertible Notes; $2,000,000 of U.S. Financial Convertible Subordinated Notes; 496,000 warrants of Gulf & Western Industries; and 47,000 shares of Downe Communications, Inc.

15. During the period from March 15, 1968 to date, the defendants other than the Fund, singly and in concert, have violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder in that by the use of the mails and instrumentalities of interstate commerce, and in connection with the purchase and sale of shares of the Fund, they have directly and indirectly employed devices, schemes and artifices to defraud; they have made untrue statements of material facts, or have omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading and they have engaged in acts, practices and a course of conduct which was intended to and did operate as a fraud upon the plaintiff and other persons similarly situated.

16. As part of the aforesaid acts and transactions referred to in Paragraph 15 above, said defendants caused the Fund to file the aforesaid prospectus dated March 15, 1968 and said prospectus as revised September 3, 1968, which were false and misleading as aforesaid.

17. As part of the said acts and transactions, said defendants pursuant to a common plan and scheme caused the Fund to purchase restricted securities as referred to in Paragraph 14 above.

18. As part of the said acts and transactions, said defendants pursuant to a common plan and scheme caused the assets of the Fund and most particularly the restricted securities or letter of investment securities of the Fund to be valued at a false, inflated and exaggerated amount on the books and records of the Fund.

19. As part of the said acts and transactions, said defendants pursuant to a common plan and scheme caused the Fund to issue periodic and annual reports which were false and misleading in that the aforementioned restricted securities were evaluated in said reports at a false, inflated and exaggerated amount.

20. As part of the said acts and transactions, said defendants caused the Fund to pay to the Management Corporation excessive fees under the management agreement in that said fees were based upon false, inflated and exaggerated net asset values and a false, inflated and exaggerated investment performance. Said actions on the part of the defendants also constituted an unlawful and wilful conversion by said defendants of the monies, funds, properties and assets of the Fund in violation of Section 37 of the Investment Company Act.

21. As a result of the foregoing, plaintiff and all other persons similarly situated, in reliance upon the evaluation by said defendants of the assets of the Fund and upon the aforesaid prospectuses and other reports caused by said

defendants to be issued by the Fund, were fraudulently caused by pay false, inflated and exaggerated amounts for their shares of the Fund, which amounts did not truly reflect the net asset value of said shares of the Fund.

22. The aforesaid conduct of said defendants constituted a gross fraud and a violation of their fiduciary duties to the plaintiff and to other persons similarly situated and was in wanton disregard of the damage or injury to plaintiff and all other persons similarly situated.

23. By reason of the foregoing acts of said defendants, the plaintiff and all other persons similarly situated who purchased shares of the Fund since March 15, 1968 have been damaged in an amount in excess of $1,000,000.

Count Two

Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 and 3 through 20 with the same force and effect as if set forth at length herein.

24. Plaintiff brings this action derivatively in the right of and for the benefit of the Fund.

25. Plaintiff has been the owner of shares of the Fund at the time of the transactions complained of herein and continuously to date.

26. This action is not brought collusively to confer jurisdiction on this Court which it otherwise would not have.

27. As part of the aforesaid acts and transactions, defendants Management Corporation, Oppenheimer & Co. and Levy, Nash and Delaney failed to disclose to other directors

of the Fund the true value of the restricted securities purchased by the Fund as aforesaid.

28. As a result of the foregoing acts, said defendants have caused the Fund to redeem shares of the Fund for false, inflated and exaggerated amounts, which amounts did not truly reflect the net asset value of said shares of the Fund.

29. By reason of the foregoing acts, the Fund has been damaged in an amount in excess of $1,000,000.

30. The aforesaid conduct of the defendants constituted a gross fraud and a violation of their fiduciary duties to the Fund and evidenced a complete indifference to their obligations to the Fund, and was in wanton disregard of the damage or injury to the Fund.

31. By reason of the foregoing acts, Management Corporation, Oppenheimer & Co. and some of the individual defendants have made substantial profits and the Fund has suffered substantial damage. The precise amount of said profits and damages are unknown to plaintiff and can be determined only upon an accounting in this action.

32. By reason of the premises, the investment advisory contract and the general distribution contract between the Fund and the Management Corporation is illegal and void under Section 47(b) of the Investment Company Act.

33. A. Demand on the Board of Directors of the Fund to bring this action would be futile since all of the members of the Board of Directors participated in, authorized or acquiesced in the actions and transactions complained of

herein. They have taken no steps to prevent any of the wrongs complained of or to seek redress therefor. Furthermore, the members of the Board of Directors are themselves defendants in this action. Any demand upon them to redress the wrongs herein complained of would, in effect, constitute a demand that they bring the action against themselves and would have been futile.

B. Demand upon the stockholders of the Fund to bring this action is unnecessary and would be futile because

(1) under the Charter and By-laws of the Fund, the management of its affairs including the bringing of suits is entrusted to the Board of Directors and not the stockholders. The stockholders cannot by resolution or otherwise require the Fund or its Board of Directors to bring action.

(2) A stockholder resolution demanding the bringing of a suit would be futile since the control of the action would be in the hands of the very persons who are alleged to be wrongdoers and cannot properly be prosecuted by them.

WHEREFORE, plaintiff demands judgment as follows:

A. Holding all of the defendants other than the Fund jointly and severally liable for all damages which the plaintiff and all other persons similarly situated have sustained by virtue of the acts and transactions complained of in Count One herein;

B. Holding all of the defendants other than the Fund jointly and severally liable for all of the damages which

have been sustained by the Fund by virtue of the acts and transactions complained of in Count Two herein;

C. Requiring the defendants other than the Fund jointly and severally to account to the Fund for all profits made by them as a result of the acts and transactions complained of in Count Two herein;

D. Declaring the Investment Advisory Agreement or any extentions or modifications thereof between the Management Corporation and the Fund to be null and void;

E. Awarding to plaintiff the costs and disbursements of this action including reasonable attorneys' fees and accountants' fees;

F. Granting such other and further relief as to this Court may seem just and proper.

WOLF POPPER ROSS WOLF & JONES

By: /s/ DONALD N. RUBY
A Member of the Firm
Attorneys for the Plaintiff
Office and P.O. Address
845 Third Avenue
New York, N.Y. 10022
PL. 9-4600

State of New York,
County of New York, *ss.:*

Irving Sanders, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has read the foregoing complaint and knows the contents thereof; that said complaint is made on information and belief but that he believes it to be true.

/s/ Irving Sanders
Irving Sanders

[Sworn to March 25, 1969]

Complaint

No. 69 Civ. 2029

UNITED STATES DISTRICT COURT
Southern District of New York

Egon Taussig,

Plaintiff,

—against—

Sidney M. Robbins, Eric Hauser, Murray Graham, Emanuel Celler, Joseph M. McDaniel, Jr., Jack Nash, Edmund T. Delaney, Leon Levy, Oppenheimer Management Corporation, Oppenheimer & Company, and Oppenheimer Fund, Inc.,

Defendants.

Plaintiff Demands Trial by Jury

Plaintiff, by his attorneys, Leibowitt, Milberg, Weiss & Fox, for his complaint herein, alleges the following on information and belief except as to paragraphs 1, 2, 3 and 4(b), all of which are alleged on knowledge.

Count I

1. Plaintiff owns shares of the capital stock of Oppenheimer Fund, Inc. (hereinafter "The Fund") and was such shareholder at the times of the transactions with which this complaint deals.

2. Plaintiff brings this action derivatively in behalf of himself and all other Fund stockholders similarly situated and in behalf of and in the right of the Fund.

3. The action is not brought collusively to confer on this Court jurisdiction which it would not otherwise have.

4. (a) The action arises under the Investment Company Act of 1940 ("Investment Company Act"), the Securities Exchange Act of 1934, as amended ("Exchange Act") and the Securities Act of 1933 as amended ("Securities Act") and the rules and regulations promulgated under each of the aforesaid statutes. Jurisdiction is based on Section 44 of the Investment Company Act, Section 27 of the Exchange Act and Section 22 of the Securities Act and on principles of pendent jurisdiction.

(b) Plaintiff is a citizen of the State of New York.

(c) The transactions hereinafter alleged occurred in substantial part in the State of New York.

5. The Fund is a corporation organized under the laws of New York. It is an open-end non-diversified management investment company registered as an investment company under the Investment Company Act. It has its principal place of business in the Southern District. At September 31, 1968, 24,816,792 shares were issued and outstanding. The Fund has many thousands of shareholders who are located throughout the United States of America and abroad.

6. (a) At all relevant times Oppenheimer Management Corporation ("Manager") was a New York corporation. It has its principal place of business in the Southern District. Oppenheimer & Company, a New York partnership ("Partnership") owned over 80% of the stock of Manager. This stock included 100% of the voting stock. The balance of Manager's stock is owned by members of the family of certain partners of Partnership or of former partners.

Partnership, individual partners, Manager, directors and officers of the Fund and their families, and Oppenheimer as record owner for its customers between them own in excess of 98,000 shares of the Fund.

7. During all relevant times the following defendants held and hold the following officerships and directorships and interests in the Fund, Manager and Partnership:

	The Fund	*Partnerships*	*Manager*
Sidney M. Robbins	Director		
Eric Hauser	Director		
Murray Graham	Director		
Emanuel Celler	Director		
Joseph M. McDaniel, Jr.	Director		
Jack Nash	Director	Partner	Vice President & Secretary
Edmund T. Delaney	Director		
Leon Levy	President & Director	Partner	Director

8. At all relevant times the method of operation and the relationships between the Fund, Partnership and Manager were as follows:

(a) Manager acted and acts as manager of the Fund under an Investment Advisory Agreement with the Fund under which the Fund's investment portfolio was managed by Manager and it furnished at its own expense investment analysis and statistical and research information and other information to the Fund. Manager's compensation for its services as investment advisor, denominated as a management fee, was twofold. It received fixed percentages of ½ of 1% computed daily on the first $150,000,000 of net asset value and it received a fee each year if for the prior year it had bettered the price performance of the Composite Stock Price Index for 500 Stocks maintained by Standard & Poor Corp. If the Fund's asset growth did not equal the performance of said index, Manager was required to make a refund to the Fund.

(b) A Distribution Agreement between Manager and the Fund granted Manager the right to act as exclusive distributor and sole principal underwriter of the shares of the Fund, for which Manager received and retained a substantial portion of the sales commissions.

9. For the purpose of fostering and serving their own interests at the expense of the Fund, the defendants entered into a common plan and conspiracy, in violation of the fiduciary obligations to the Fund and its shareholders imposed on them by virtue of the individual defendants' positions as directors of the Fund, the relationship between the Manager and the Fund, and the relationship between the Partnership and the Fund through the domination and control of the Manager by the Partnership, by causing the Fund to commit the following acts of omissions and commissions:

(a) They caused the Fund to purchase securities whose sale and distribution have been restricted by the Securities Act (Restricted Securities) and to agree to purchase said securities subject to the said restrictions. The said securities were purchased at discounts from the market value of securities of the same companies which were not similarly restricted and which could be sold and distributed freely by and to the public (Free Securities); that the said Restricted Securities were included in the net asset value of the shares of the Fund and not at the purchase price, but, in the case of Free Securities of the same company traded on a National Exchange, at the last reported sale and as to over the counter securities at the last quoted bid price of Free Securities of the same company. Such values at which the Restricted Securities were carried did not truly reflect the actual value of the said Restricted Securities in that, under the investment and speculative climate which then prevailed and still prevails, public knowledge that the Fund had purchased such securities would tend to drive the market value of the Free Securities even higher. Further, the value at which the Restricted Securities were carried in the assets of the Fund, did not reflect their true value, but were excessive values since if the Fund was required to or decided to sell the said Restricted Securities, they could not be freely liquidated because they could only be sold to the public after registration under the Securities Act, the time which might elapse between the decision to sell said Restricted Securities and the effective date of such registration might involve a change of circumstances which would reduce the proceeds of the sale of said securities, the public knowledge that the Fund had offered said securities for registration would tend to drive the price down, the cost of registration and sale of such Restricted Securities, particularly on the Over-the-Counter market, would be far in excess of the cost of sale of Free Securities, and a sale of such Restricted Securities without registration might be difficult in that purchasers of large blocks of such securities could not readily be found.

10. The holding of such Restricted Securities by the Fund, when combined with a substantial run-up in the

price of the Free Securities of the same companies, therefore created a spurious appearance of better price performance for the Fund and a spurious increase in the net asset value of the Fund as reported to the public and to its shareholders. This false facade of superior performance also increased the rate of sale of Fund Shares to the public.

11. By reason of the foregoing the defendants were enabled to increase the commissions which the Manager derived from expanded sales, and to increase the basic management fee and in addition that aspect of the management fee which was based on comparative performance with the Standard & Poor Composite Price Index above alleged.

12. The defendants caused the Fund, in or about March of 1968 to offer shares for sale to the public by means of a Prospectus dated March 15, 1968 and thereafter revised under date of September 3, 1968, (hereafter collectively described as "Prospectus") which was disseminated to the public by the use of the mails and other instrumentalities in interstate commerce. The aforesaid Prospectus and the revised version thereof were false and misleading, in that they omitted or failed to state material facts which were necessary in order to make statements contained therein, in the light of the circumstances under which they were made, not misleading, in that they failed to set forth the characteristics of and the various considerations in connection with such Restricted Securities, as alleged in paragraphs "9" and "10" above.

13. Said acts and omissions, including the issuance of said Prospectus, constituted violations of Section 10(b) of

the Exchange Act and Rule 10b-5 issued thereunder, and said acts of omission and commission were performed in connection with the purchase and sale of shares of the Fund, and constituted devices, schemes and artifices to defraud, constituted the making of untrue statements of material facts or omissions of said material facts necessary in order to make other statements made, not misleading, and were also acts, practices and a course of conduct which tended to and did operate as a fraud upon the Fund, and its shareholders, including the plaintiff.

14. The aforesaid acts and omissions were also violations of the fiduciary obligations owed by the defendant directors to the Fund and its Shareholders, constituted breaches of their duties of loyalty to the Fund, and were engaged in recklessly and with wanton disregard of the interests of the Fund and its Shareholders and to further the interests of the defendants, Oppenheimer Management Corporation and Oppenheimer & Company.

15. The aforesaid acts of the defendants other than the Fund constitute a breach of the investment advisory contract and general distribution contract between the Fund and Oppenheimer Management Corporation, and all payments made to the said Oppenheimer Management Corporation after the occurrence of the said breaches should be repayable to the Fund.

16. As a result of the foregoing the Fund sustained damage in the following ways:

(a) The advisory fees were calculated on the inflated values of the net assets arising out of the false and misleading valuations of the Restricted Securities.

(b) When Fund shares were redeemed, the redemption value of the said Fund shares reflected the inflated value of the Restricted Securities and the Fund paid out more moneys to those shareholders who redeemed than it would have paid out otherwise;

(c) Because of the possibility of the redemptions at the inflated values, the Fund was forced to maintain a larger cash reserve, since it could not freely sell the Restricted Securities to create a cash reserve when needed, and was thereby forced to sell saleable Free Securities, or, was damaged by reason of the inability to maintain such large cash reserve to purchase Free Securities of other corporations and to realize gains and dividends therefrom.

(d) The foregoing practices constituted a conversion by the defendants of assets of the Fund in violation of the Investment Company Act.

(e) The aforesaid practices were publicly exposed and received wide pubicity in the public press including various media to which the investment public and the financial community had access. The said unfavorable publicity was damaging to the public image of the Fund.

(f) As a result of the foregoing, reports sent in by the Fund to the Securities and Exchange Commission and required by the Exchange Act, the Securities Act and the Investment Company Act were false and misleading in that they contained valuations of the Restricted Securities in inflated amounts, which did not reflect their true value, thereby exposing the Fund to liability for violation of the said Acts.

17. The foregoing practices constituted gross negligence, were in wanton and reckless disregard of the rights of the Fund and its shareholders, and were engaged in by the defendants other than the Fund for their own profit and aggrandizement, and the Manager benefited by the increase in the amount of the advisory fees, both with respect to the basic fee and the fee for performance, from the sales commissions generated by the false appearance of investment success, and the Partnership, the individual partners and their relatives, benefited from the increase in the value of their stock in the Manager. The aforesaid acts were engaged in for the said purposes and not for purposes related to the best interests of the Fund and the Fund shareholders.

18. The foregoing practices and breaches of fiduciary duty alleged above were caused, or permitted, or acquiesced in by Manager and those individual defendants who were officers, owners and directors of Manager and of the Fund, and by the Partnership, all with knowledge or notice of the facts above alleged and the illegality of the aforesaid practices and pursuant to a plan among them to benefit themselves at the expense of the Fund and its shareholders.

19. The Manager, the Partnership and certain of the individual defendants have made substantial profits by reason of the foregoing, and the Fund has suffered substantial damages.

20. In addition thereto the defendants other than the Fund by reason of the willful, reckless and wanton nature of their fraud and breach of fiduciary obligations, and their sacrifice of the interests of the Fund and its shareholders to their own interests have made themselves liable to ac-

count to the Fund for their own profits, and for the damages sustained to the Fund.

21. No demand has been made by the plaintiff upon the Fund to institute and prosecute this action against the defendants named herein, because Manager and its and the Fund directors are named as defendants herein, and they have participated in, acquiesced in or have profited from, and are personally liable for the wrongs complained of in this action; and any demand upon them to institute such an action would have been futile and useless in that thereby said defendants would have been required to institute an action against themselves and any action so instituted by them would be friendly to the defendants and hostile to the interests of Fund and its shareholders.

22. No demand has been made upon the shareholders of the Fund to institute and prosecute this action against the defendants named herein, because the wrongs alleged are in violation of Federal statute, are illegal, and are not subject to ratification by the shareholders of Fund; and under New York law the directors of the Fund and not the shareholders, are vested with the management of Fund including the institution of all actions in behalf of Fund; and a resolution by the shareholders of Fund directing the institution of this action would be futile and useless because the prosecution of the action would be placed in the control of Manager and its directors. Furthermore, there are many thousands of public shareholders of the Fund scattered throughout the United States and abroad and it would be impracticable to bring them all before the court and the solicitation of proxies from such a large and scattered number of shareholders would place an unreasonable burden and expense on the plaintiff, and extended delays

would result which would be harmful and seriously prejudicial to the prosecution of this action, and might result in the application of statutes of limitations to bar this action.

23. Plaintiff has no adequate remedy at law.

24. Plaintiff will fairly insure the adequate representation of the similarly situated shareholders of the Fund and of the Fund.

Count II

25. The plaintiff repeats and realleges, each and every allegation contained in paragraphs 1 and 3 to 20 inclusive with the same force and effect as though fully set forth herein.

26. Plaintiff brings this cause of action on a representative basis on his own behalf and on behalf of all other persons similarly situated who purchased Fund shares since March 15, 1968. The said persons constitute a class which is so numerous that joinder of all of its members would be impracticable. Questions of law and fact exist common to the class and the claims of this plaintiff are typical of the claims of the class and he will fairly and adequately represent and protect the interests of the class.

27. The Prospectus described in paragraph "11" in addition to the misleading statements and omissions alleged therein omitted to state that the Fund intended to or had invested in Restricted Securities, and did not adequately or clearly set forth that the risks of investment in such Restricted Securities were greater than those involved in investments in Free Securities.

28. The plaintiff, on or about December 24, 1968, purchased 2,302.026 shares of the Fund at $10.86 per share.

29. In making the aforesaid purchase the defendant relied on the said Prospectus.

30. The members of the class whom plaintiff herein represents, also purchased shares of the Fund relying upon the said Prospectus.

31. The defendants other than the Fund, when they caused the said Prospectus to be issued, intended that the public, including the plaintiff, would rely on the information set forth therein and intended that members of the public including the plaintiff would purchase such shares in reliance thereon.

32. The plaintiff and the said members of the class were damaged by reason of the premises, in that the prices paid by them for their shares of the Fund, were inflated and in excess of the true value thereof and did not truly reflect the net asset value of the shares of the Fund at which such purchases were required to be made.

33. The plaintiffs and all other persons similarly situated have sustained substantial damages and the defendants other than the Fund are liable to them therefor, and are also liable to the plaintiffs and the class for punitive damages.

Wherefore, the plaintiff demands judgment as follows:

(a) Requiring all defendants other than the Fund to account jointly and severally to the Fund, for all damages sustained by the Fund, and for all profits

made by them as a result of the acts and transactions complained of in Count I herein;

(b) Declaring the investment advisory agreement and the distribution contract and any extensions or modifications of said agreement between Oppenheimer Management Corporation and the Fund to be null and void; and directing defendants other than the Fund to account to the Fund for all fees received thereunder;

(c) Declaring that the cause of action alleged in Count II hereof is a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure;

(d) Declaring that all of the defendants are jointly and severally liable for all damages which plaintiff and all other persons similarly situated have been caused by virtue of the acts and transactions complained of in Account [*sic*] II hereof, together with punitive damages;

(e) Awarding to the plaintiff the costs and disbursements of this action including reasonable attorneys' fees and accountants' fees;

(f) Granting such other and further relief as to this Court may seem just and proper.

Leibowitt, Milberg, Weiss & Fox
By /s/ Lawrence Milberg
Member of the Firm
Attorneys for Plaintiff
Office & P. O. Address
2 Pennsylvania Plaza
New York, N. Y. 10001

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

EGON TAUSSIG, being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

/s/ EGON TAUSSIG
Egon Taussig

[Sworn to May 7, 1969]

Complaint

No. 69 Civ. 2642

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs,

—against—

ERIC HAUSER, EMANUEL CELLER, EDMUND T. DELANEY, LEON LEVY, JACK NASH, JOSEPH M. McDANIEL, JR., SIDNEY M. ROBBINS, OPPENHEIMER MANAGEMENT CORPORATION, OPPENHEIMER & COMPANY and OPPENHEIMER FUND, INC.,
Defendants.

Plaintiffs Demand Trial by Jury

Plaintiffs, by their undersigned attorney, for their complaint, allege upon information and belief, except paragraph "14" hereof, which is alleged upon knowledge:

1. (a) Jurisdiction herein is based upon Section 22 of the Securities Act of 1933, ("1933 Act"), Section 27 of the Securities Exchange Act of 1934 ("1934 Act") and Section 44 of the Investment Company Act of 1940 ("1940 Act").

(b) The action arises under Sections 12(2) and 17 of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 of the Rules under the 1934 Act, Sections 22, 30 and 37 of the 1940 Act and the Rules thereunder.

(c) This action is not a collusive one to confer on the Court jurisdiction it would not otherwise have.

2. (a) Defendant Oppenheimer Fund, Inc. (the "Fund") is a corporation duly organized and existing under the laws of New York.

(b) The Fund is registered under the 1940 Act as an open-end diversified investment company.

(c) The shares of the Fund are offered for sale and sold to the public at a price which is alleged to represent the net asset value thereof to which is added a sales charge.

(d) On December 31, 1968, 26,741,767 shares of the Fund were issued and outstanding, of which in excess of 5,000,000 shares have been issued since March 15, 1968.

3. (a) Oppenheimer Management Corporation (the "Manager") is a corporation duly organized and existing under the laws of New York.

(b) The Manager has acted and continues to act as the Investment Adviser to the Fund and the supervisor of its portfolio pursuant to a written contract which provides for compensation to the Manager payable monthly based upon a percentage of net assets and in addition annually upon performance of the Fund as compared with the Standard & Poor's Composite Stock Price Index of 500 stocks (the "Index"). Such performance fee is added to the basic fee if the Fund outperforms the Index and the basic fee is reduced in the event the Index outperforms the Fund.

(c) The Manager has acted and continues to act as underwriter of the Fund's shares receiving as commissions a sales charge at a rate not in excess of 8½% of the offering price. The Manager also acts as Sponsor and General Distributor for the Oppenheimer Systematic Capital Accumulation Program.

4. (a) Defendant Oppenheimer & Co. (the "Broker") is a New York partnership and is a member of the New York Stock Exchange.

(b) The Broker owns 11,000 shares of the voting stock of the Manager which constitutes approximately 82% of the outstanding stock of the Manager. The non voting stock of the Manager is owned principally by the members of the families or partners or former partners of the Broker.

(c) The Broker owns approximately 33,000 shares of the Fund's stock and is the largest holder of shares of the Fund. Together with the Manager, the officers and directors of the Fund, the partners of the Broker and the members of their families, they own in excess of 80,000 shares of the Fund's shares. In addition, the Broker is the record owner of approximately 13,000 shares owned by its customers.

(d) The Broker acts as principal broker for the Fund in the purchase and sale of the Fund's portfolio securities.

5. (a) The individual defendants are all of the directors of the Fund.

(b) Defendant Leon Levy is President of the Fund and is a partner of the Broker and President and a Director of the Manager.

(c) Defendant Edmund T. Delaney is a member of the law firm which is counsel for the Fund.

(d) Defendant Jack Nash is a partner of the Broker and is a Vice President and Assistant Secretary of the Manager.

(e) All the officers of the Fund are either partners or employees of the Broker or officers or employees of the Manager.

6. Commencing with March 15, 1968 and continuing to the present, the defendants other than the Fund in connection with the sale and purchase of shares of the Fund and by the use of the mails and instrumentalities of interstate commerce, have directly and indirectly employed devices, schemes and artifices to defraud; have made untrue statements of material facts, or have omitted to state material facts in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and, have engaged in acts, practices and a course of conduct which was intended to and did operate as a fraud upon the plaintiff and other similarly situated persons, in violation of Sections 12(2) and 17 of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 of the Rules promulgated under the 1934 Act and Sections 22, 30 and 37 of the 1940 Act.

7. The violations hereinbefore referred to in paragraph "6" hereof were caused by the defendants, other than the Fund, by causing the Fund to issue a prospectus for the sale of the Fund's shares, dated March 15, 1968 and a revised prospectus dated September 3, 1968.

8. The aforesaid prospectus and revised prospectus were false and misleading in the following respects:

(a) They failed to disclose that the Fund would invest in restricted securities known as "investment letter securities."

(b) They failed to disclose that restricted securities purchased by the Fund could not be resold without registration under the 1933 Act.

(c) They failed to disclose that such securities could not be registered under the 1933 Act for a considerable period of time.

(d) They failed to disclose that a considerable period of time could elapse betwen such registration and any sale thereunder.

(e) They failed to disclose that the sale of restricted securities would require an underwriter and that the fees and commissions paid an underwriter would reduce the net sales to the Fund to a price lower than the market price for unrestricted stock.

(f) Restricted securities involve greater risk than unrestricted securities.

9. Subsequent to March 15, 1968 the Fund was, caused by the defendants, to purchase the following restricted securities, among others:

50,000 shares of Unexcelled, Inc.

28,000 shares of Trans-lux Corp.

5,000 warrants of Saxon Paper Corp.

$2,000,000 of Saxon Industries Senior Subordinated Convertible Notes.

$2,000,000 of U.S. Financial Convertible Subordinated Notes.

496,000 warrants of Gulf & Western Industries.

47,000 shares of Downe Communications, Inc.

10. In furtherance of the violations referred to in paragraph "6" hereof and pursuant to a common scheme and plan the defendants caused the assets of the Fund and specifically the restricted securities of the Fund to be overvalued on the books of the Fund.

11. In furtherance of the aforesaid violations and in pursuance of the aforementioned common scheme and plan the

Fund was caused to issue interim and annual reports which were false and misleading in containing overvaluations of such restricted securities.

12. In furtherance of said violations and in pursuance of the aforesaid common scheme and plan, the Fund was caused to pay excessive fees to the Manager based upon such overvalued restricted securities and constituted a conversion of assets of the Fund in violation of Section 37 of the 1940 Act.

13. In reliance upon the prospectus dated March 15, 1968 and the revised prospectus dated September 3, 1968 and financial reports issued by the Fund, the plaintiffs and other persons similarly situated purchased the Fund's shares.

14. The plaintiffs purchased 22.599 shares of the Fund on April 24, 1968 and 19.512 shares on October 1, 1968.

15. Plaintiffs bring this action on their own behalf and representatively on behalf of all other persons who purchased shares of the Fund subsequent to March 15, 1968.

16. (a) The persons similarly situated with the plaintiffs constitute a class so numerous that joinder of all members is impractical;

(b) There are questions of law or of fact common to the class;

(c) The claims of the plaintiffs are typical of the claims of the class;

(d) The plaintiffs will fairly and adequately protect the interests of the class.

17. By reason of the foregoing the plaintiffs and the other members of the class have sustained damages in the aggregate exceeding $1,000,000.

18. Plaintiffs have no adequate remedy at law.

COUNT TWO

19. Plaintiffs repeat paragraphs "1" through "14" and "18" hereof.

20. (a) Plaintiffs bring this Count derivatively in the right of and for the benefit of the Fund.

(b) Plaintiffs have been stockholders of the Fund since April 24, 1968 and have been stockholders at the time of the transactions of which they complain.

21. This action is not a collusive one to give this Court jurisdiction it would not otherwse have.

22. Defendants the Manager, the Broker, Levy, Nash and Delaney fraudulently failed to disclose to the other directors of the Fund, the true value of the restricted securities purchased by the Fund as hereinbefore set forth.

23. As a result of the foregoing fraudulent acts of the said defendants, the Fund has been caused to redeem its shares at excessive values, which values reflected the false and overvalued restricted securities heretofore referred to.

24. As a result of the fraudulent acts of the said defendants, the Fund has sustained damages in excess of $1,000,000.

25. The acts of the defendants constituted violations of the 1933 Act, the 1934 Act and the Rules thereunder and the 1940 Act and constituted a violation of their fiduciary duties to the Fund.

26. As a result of their acts, the Manager, Broker and a number of the individual defendants have made large profits and caused substantial damage to the Fund, the exact amount of such profits and damage being presently unknown to plaintiffs.

27. As a result of the illegal and fraudulent acts of the defendants, the investment advisory contract and the distribution agreement between the Fund and the Manager are illegal and void under Section 47(b) of the 1940 Act.

28. Plaintiffs have made no demand upon the Fund or the directors of the Fund to bring this action because such demand would be futile because all of the directors participated in, approved of or acquiesced in the acts and transactions complained of herein. The directors have long known of the acts hereinbefore complained of but have taken no action with respect thereto. The directors are themselves defendants in the action and any action brought by the Fund would have to be brought against them and any such action could not and would not be diligently prosecuted.

WHEREFORE, plaintiffs demand judgment as follows:

A. Finding the defendants other than the Fund jointly and severally liable for all damages which plaintiffs and other persons similarly situated have sustained as a result of defendants illegal conduct complained of in Count One herein;

B. Finding the defendants other than the Fund, jointly and severally liable to the Fund for damages sustained by it as a result of the acts complained of in Count Two;

C. Requiring the defendants, other than the Fund to account to the Fund for all their profits as a result of the acts complained of in Count Two herein;

D. Declaring the investment advisory and the underwriting agreements between the Manager and the Fund null and void;

E. Awarding plaintiffs the costs and disbursements of this action, including a reasonable allowance of counsel fees to their attorney; and

F. Granting plaintiffs such other and further relief as to this Court may seem just and proper.

/s/ ABRAHAM I. MARKOWITZ
ABRAHAM I. MARKOWITZ
Attorney for Plaintiffs
Office & P.O. Address
276 Fifth Avenue
New York, N. Y. 10001
Mu 4-4771

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

MICHAEL SHAEV, being duly sworn, deposes and says that he is one of the plaintiffs in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

/s/ MICHAEL SHAEV
MICHAEL SHAEV

[Sworn to June 9, 1969]

Amended Answer of Defendants Oppenheimer Management Corp., et al.

No. 69 Civ. 1242*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IRVING SANDERS,

Plaintiff,

—against—

LEON LEVY, JACK NASH, EDMUND T. DELANEY, EMANUEL CELLER, ERIC HAUSER, JOSEPH M. MCDANIEL, JR., SIDNEY M. ROBBINS, OPPENHEIMER MANAGEMENT CORPORATION, OPPENHEIMER & COMPANY, and OPPENHEIMER FUND, INC.,

Defendants.

The defendants, Oppenheimer Management Corporation, Oppenheimer & Company, Leon Levy and Jack Nash by Guggenheimer & Untermyer, their attorneys, for their amended answer to the complaint herein:

1. Admit the averments of paragraph 1 of the complaint.

2. Deny each and every averment contained in paragraphs 2 and 24 of the complaint, except admit that the action purports to be brought representatively on behalf of those of the shareholders of Oppenheimer Fund, Inc.

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* The amended answers of these defendants to the complaints filed in 69 Civ. 2029 and 69 Civ. 2642 have not been included in the appendix herein. Relevant to these proceedings, the amended answer of these defendants to each of the respective complaints does not differ in any substantial way.

(herein called the "Fund") who purchased shares of the Fund subsequent to March 15, 1968 and derivatively on behalf of the Fund.

3. Deny each and every averment contained in paragraph 3 of the complaint, except admit that the jurisdiction of this Court purports to be based upon Section 27 of the Securities Exchange Act, 15 U.S.C. §78(aa), Section 44 of the Investment Company Act, 15 U.S.C. §80a-43, Sections 1331 and 1337 of the Judicial Code, 28 U.S.C. §§1331 and 1337, and the doctrine of pendent jurisdiction.

4. Admit the averments of paragraph 4 of the complaint, except deny that the public offering price of shares is other than the net asset value of said shares plus a stated sales charge.

5. Admit the averments of paragraphs 5, 6, 7, 9, 10, 11, 25 and 26 of the complaint, except aver that defendant Jack Nash is an assistant secretary of Oppenheimer Management Corporation, not the secretary as averred in paragraph 10 of the complaint.

6. Admit the averments contained in paragraph 8 of the complaint, except that the shareholdings therein referred to were true only as of December 31, 1967.

7. Deny each and every averment contained in paragraph 12 of the complaint, except admit that the Fund filed a prospectus with the Securities and Exchange Commission for the sale of shares of the Fund which became effective on March 14, 1968, thereafter said prospectus was revised effective September 3, 1968, and that shares of the Fund

have been sold since March 15, 1968 by use of the mails and other instrumentalities in interstate commerce.

8. Deny each and every averment of paragraph 13 of the complaint, except admit that said prospectus and revised prospectus did not state the matters referred to in subdivision B of said paragraph.

9. Deny each and every averment contained in paragraph 14 of the complaint, except admit that subsequent to March 15, 1968 the Fund purchased the restricted securities therein referred to.

10. Deny each and every averment contained in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 27, 28, 29, 30, 31 and 32 of the complaint.

11. Deny each and every averment contained in paragraph 33 of the complaint except admit that the Board of Directors of the Fund would not bring this action.

FIRST AFFIRMATIVE DEFENSE

12. The Fund is an open-end diversified investment company of the management type, organized under the laws of the State of New York. The Fund's shares are registered under the Securities Act of 1933, 15 U.S.C. §§77a et seq. The Fund is registered under the Investment Company Act of 1940, 15 U.S.C. §§80a-1 et seq., and it conducts its business in compliance with said Acts and with the rules and regulations issued by the Securities and Exchange Commission thereunder.

13. The shares of the Fund are offered for sale to the public pursuant to registration statements which have duly

become effective under the Securities Act of 1933, which registration statements include detailed prospectuses which are issued at least annually by the Fund. Each year the Fund delivers to its shareholders a proxy statement in connection with the annual meeting of shareholders at which the shareholders vote for, among other things, the election of directors and approval of, among other things, the Investment Advisory Agreement between the Fund and Oppenheimer Management Corporation (hereinafter referred to as "Management Corporation").

14. All prospectuses and proxy statements of the Fund are submitted for examination and review to the Securities and Exchange Commission prior to release and distribution to prospective purchasers and holders of shares of the Fund.

15. Said prospectuses and proxy statements have at all times disclosed fully and fairly the terms of agreements between the Fund and Management Corporation, including the compensation paid by the Fund to Management Corporation for advisory and management services and the compensation paid to Oppenheimer & Co. for services, including underwriting and brokerage services. Such prospectuses and proxy statements disclose fully and fairly all material relationships among the Fund, its officers and directors, Management Corporation and Oppenheimer & Co.

16. The Fund regularly publishes and distributes to its shareholders annual, semi-annual and quarterly reports, which clearly and accurately set forth all payments made

by the Fund to Management Corporation and to Oppenheimer & Co.

17. Upon information and belief, at or prior to the time plaintiff became a shareholder of the Fund he received a copy of the then current prospectus of the Fund, and since he became a shareholder he has received copies of all annual, semi-annual and quarterly reports of the Fund.

18. The Fund's semi-annual report to its shareholders for the period ending June 30, 1968, the quarterly report for September 30, 1968, the report for year ended December 31, 1968 and subsequent reports all set forth that the Fund had acquired securities under investment letters with restrictions on transfer or resale and that the valuation thereof had been determined by the Board of Directors of the Fund.

19. At no time during the period referred to in the complaint did the value of investment letter securities of the Fund exceed 10% of the value of all of the securities of the Fund.

20. To the extent that the value of the Fund's investments in investment letter securities may be deemed material, there was fair, adequate and timely disclosure thereof to the shareholders of the Fund.

SECOND AFFIRMATIVE DEFENSE

21. Defendants repeat and reallege each of the allegations contained in paragraphs 12 through 20, inclusive, of this answer as though fully set forth at length herein.

22. Upon information and belief, at no time prior to the institution of this action did the plaintiff express to the defendants disapproval of the matters of which he now complains in the complaint herein.

23. Upon information and belief, the plaintiff and shareholders of the Fund have acquiesced in and approved the matters and transactions alleged in the complaint, received the benefits of the securities acquired by the Fund, and they have, therefore, waived the claims, if any, with respect thereto and are barred from complaining of said matters and transactions.

Third Affirmative Defense

24. Defendants repeat and reallege each of the allegations contained in paragraphs 12 through 23, inclusive, of this answer with the same force and effect as though set forth at length herein.

25. The prospectus of the Fund, as supplemented on September 3, 1968, set forth the extent of the Fund's investments in investment letter securities and stated that the Fund would not make any investment which would cause more than 15% of the value of its assets to be invested in securities which are subject to legal or contractual restrictions on resale or are otherwise not readily saleable.

26. Shareholders of the Fund, including plaintiff, who purchased Fund shares subsequent to receipt of the Fund's semi-annual report for the period ending June 30, 1968 or of the Fund's prospectus as supplemented on September 3, 1968 had due notice that the Fund had acquired and

might continue to acquire investment letter securities, and they are therefore estopped to assert any claims with respect to such securities acquired after such dates.

Fourth Affirmative Defense

27. Defendants repeat and reallege each of the allegations contained in paragraphs 12 through 26, inclusive, of this answer with the same force and effect as though set forth at length herein.

28. Upon information and belief, the plaintiff does not fairly and adequately represent the interests of the shareholders of the Fund for, among other things, the following reasons:

(a) The great majority of shareholders approved the purchases of the restricted securities referred to in the complaint and the valuation thereof by the Board of Directors of the Fund;

(b) The plaintiff's claims herein involve a conflict of interest in that he seeks to recover for himself and others damages for alleged overpayments which he and others made to the Fund while at the same time he seeks to sue derivatively on behalf of the Fund to recover alleged overpayments made by the Fund to others.

29. Upon information and belief, plaintiff may not maintain this action derivatively on behalf of the Fund or representatively on behalf of the shareholders of the Fund.

FIFTH AFFIRMATIVE DEFENSE

30. Defendants repeat and reallege each and every allegation contained in paragraphs 10 through 29, inclusive, of this answer with the same force and effect as if set forth at length herein.

31. Section 2(a)(39) of the Investment Company Act of 1940, 15 U.S.C. Section 80a-2(a)(39), provides in relevant part that with respect to assets of registered investment companies the value of the securities for which market quotations are readily available shall be the market value of such securities and the value of other securities and assets shall be the fair value as determined in good faith by the board of directors of the investment company. Rule 2a-4 of the General Rules and Regulations issued by the Securities and Exchange Commission under the Investment Company Act of 1940 provides in relevant part that in computing the price of Fund shares for the purpose of distribution, redemption and repurchase, portfolio securities for which market quotations are readily available shall be valued at current market value and other securities shall be valued at fair value as determined in good faith by the board of the directors of the Fund.

32. At all times while the transferability of the securities referred to in the complaint herein was restricted, the value of each such security for the purposes referred to in the complaint was determined in good faith by the Board of Directors of the Fund, and such value was in each case the fair value thereof, in accordance with the requirements of the aforesaid statute and Rule.

SIXTH AFFIRMATIVE DEFENSE

33. Defendants repeat and reallege each and every allegation contained in paragraphs 10 through 32, inclusive, of this answer with the same force and effect as if set forth at length herein.

34. Each of the claims set forth in the complaint is barred by laches.

SEVENTH AFFIRMATIVE DEFENSE

35. Defendants repeat and reallege each of the allegations contained in paragraphs 12 through 20 and 30 through 32, inclusive, of their answer with the same force and effect as if set forth at length herein.

36. In Count One of the complaint herein, plaintiff alleges, among other things, that he brings this action on his own behalf and representatively on behalf of all other persons similarly situated who purchased shares of Oppenheimer Fund, Inc. (the "Fund") subsequent to March 15, 1968 (hereinafter referred to as the "Purchasing Class"), and plaintiff seeks to recover for himself and members of the Purchasing Class excessive amounts claimed to have been paid on the purchase of said shares by reason of alleged overvaluation of restricted securities in the portfolio of the Fund.

37. In Count Two of the complaint herein, plaintiff alleges, among other things, that he brings this action derivatively on behalf of the Fund to recover from defendants excessive amounts claimed to have been paid by the Fund when the Fund was required to redeem shares of

the Fund and that such excessive amounts were paid by reason of alleged over-valuation of restricted securities in the portfolio of the Fund.

38. Upon information and belief, since March 15, 1968 plaintiff and/or members of the Purchasing Class have caused the Fund from time to time to redeem some or all of their Fund shares.

39. At all relevant times, the method of valuing Fund shares for purposes of redemption was the same as the method of valuing Fund shares for purposes of sale, and if restricted securities were overvalued in connection with sale of Fund Shares as alleged by plaintiff, they were similarly overvalued in connection with redemption of Fund shares.

40. If the defendants are liable to plaintiff and members of the Purchasing Class in connection with the purchase of Fund shares by reason of overvaluation of restricted securities in the portfolio of the Fund, then plaintiff and members of the Purchasing Class who have redeemed Fund shares since March 15, 1968 have received excessive amounts by reason of such alleged overvaluation of restricted securities and are liable to the defendants to the extent thereof.

41. By reason of the foregoing, plaintiff and members of the Purchasing Class are or may be liable to defendants, wholly or in part, for the claims alleged in the complaint herein.

EIGHTH AFFIRMATIVE DEFENSE

42. Defendants repeat and reallege each of the allegations contained in paragraphs 35 through 40, inclusive, of their answer with the same force and effect as if set forth at length herein.

43. After deduction of the sales charge, the price for Fund shares purchased by plaintiff and members of the Purchasing Class was paid to and received and retained by the Fund.

44. If the defendants are liable to plaintiff and members of the Purchasing Class or to the Fund by reason of overvaluation of restricted securities in the portfolio of the Fund in connection with the sale or redemption, or both, of Fund shares, then the Fund is liable to the defendants to the extent that the Fund has received funds from plaintiff and members of the Purchasing Class by reason of such overvaluation.

45. By reason of the foregoing, the Fund is or may be liable to the defendants, wholly or in part, for the claims alleged in the complaint herein.

WHEREFORE, the defendants Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash demand judgment as follows:

1. Dismissing the complaint herein, together with the costs and disbursements of this action;

2. If said defendants are liable to plaintiff or others (including but not limited to all persons similarly situated

on whose behalf plaintiff acts as representative and defendant Oppenheimer Fund, Inc.) by reason of overvaluation of restricted securities in the portfolio of said Fund, holding the plaintiff and all such others jointly and severally liable to said defendants for all amounts received by them or to which they are entitled to the extent that such amounts were based upon overvaluation of restricted securities in the portfolio of said Fund and setting off such amounts against any amounts for which said defendants may be liable to the plaintiff and all such others; and

3. Such other, further and different relief as may be just.

Guggenheimer & Untermyer

By /s/ Leon H. Tykulsker
A Member of the Firm
Attorneys for Defendants
Oppenheimer Management Corporation,
Oppenheimer & Co., Leon Levy and
Jack Nash
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Amended Answer of Defendant Oppenheimer Fund, Inc.

No. 69 Civ. 1242[*]

UNITED STATES DISTRICT COURT

Southern District of New York

Irving Sanders,

Plaintiff,

—against—

Leon Levy, Jack Nash, Edmund T. Delaney, Emanuel Celler, Eric Hauser, Joseph M. McDaniel, Jr., Sidney M. Robbins, Oppenheimer Management Corporation, Oppenheimer & Company, and Oppenheimer Fund, Inc.,

Defendants.

Now comes Oppenheimer Fund, Inc. (Fund) by its attorneys, Weisman, Celler, Spett, Modlin & Wertheimer, and paragraph by paragraph answers the complaint herein:

1. Admits the allegations of paragraph 1.

2. Denies each and every allegation in paragraph 2, except that it admits that the action puports to be brought representatively on behalf of those of the shareholders of the Fund who purchased shares of the Fund subsequent to March 15, 1968.

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[*] The amended answers of this defendant to the complaints filed in 69 Civ. 2029 and 69 Civ. 2642 have not been included in the appendix herein. Relevant to these proceedings, the amended answer of this defendant to each of the respective complaints does not differ in any substantial way.

3. Denies each and every allegation in paragraph 3 of the complaint, except that it admits that the jurisdiction of the Court purports to be based on Section 27 of the Securities Exchange Act, 15 U.S.C. § 78(aa), Section 44 of the Investment Company Act, 15 U.S.C. § 80a-43, Sections 1331 and 1337 of the Judicial Code, 28 U.S.C. §§ 1331 and 1337, and the doctrine of pendent jurisdiction.

4. Admits the allegations of paragraph 4 of the complaint, except that it denies that the public offering price of shares is other than the net asset value of the shares plus a stated sales charge.

5. Admits the allegation of paragraph 5 of the complaint.

6. Admits the allegations of paragraph 6 of the complaint.

7. Admits the allegations of paragraph 7 of the complaint.

8. Admits the allegations contained in paragraph 8 of the complaint, except that the shareholdings therein referred to were true only as of December 31, 1967.

9. Admits the allegation of paragraph 9 of the complaint.

10. Admits the allegations of paragraph 10 of the complaint, except that it avers that the defendant Jack Nash is an assistant secretary of Oppenheimer Management Corporation (Management Corporation), not the secretary.

11. Admits the allegations of paragraph 11 of the complaint.

12. Denies each and every allegation contained in paragraph 12 of the complaint, except that it admits that the Fund filed a prospectus with the Securities and Exchange Commission for the sale of shares of the Fund which became effective on March 14, 1968, that thereafter said prospectus was revised effective September 3, 1968, and that shares of the Fund have been sold since March 15, 1968 by use of the mails and other instrumentalities in interstate commerce.

13. Denies each and every allegation of paragraph 13 of the complaint, and avers on the contrary that the prospectus of the Fund, as supplemented on September 3, 1968, stated that the Fund would not make any investment which would cause more than 15% of the value of its assets to be invested in securities which are subject to legal or contractual restrictions on resale or are otherwise not readily saleable; but admits that the text in subdivisions A and B were not set forth "in haec verba" in the prospectus.

14. Denies each and every allegation contained in paragraph 14 of the complaint, except that it admits that subsequent to March 15, 1968 the Fund purchased the restricted securities therein referred to.

15. Denies each and every allegation contained in paragraph 15 of the complaint.

16. Denies each and every allegation contained in paragraph 16 of the complaint.

17. Denies each and every allegation contained in paragraph 17 of the complaint.

18. Denies each and every allegation contained in paragraph 18 of the complaint.

19. Denies each and every allegation contained in paragraph 19 of the complaint.

20. Denies each and every allegation contained in paragraph 20 of the complaint.

21. Denies each and every allegation contained in paragraph 21 of the complaint.

22. Denies each and every allegation contained in paragraph 22 of the complaint.

23. Denies each and every allegation contained in paragraph 23 of the complaint.

24. Denies the allegation of paragraph 24 of the complaint, except that it admits that the action purports to be brought derivatively on behalf of the Fund.

25. Admits the allegations of paragraph 25 of the complaint.

26. Without making any admission as to the jurisdiction of this Court, the Fund admits that this action is not brought collusively.

27. Denies each and every allegation of paragraph 27 of the complaint.

28. Denies each and every allegation of paragraph 28 of the complaint.

29. Denies each and every allegation of paragraph 29 of the complaint.

30. Denies each and every allegation of paragraph 30 of the complaint.

31. Denies each and every allegation of paragraph 31 of the complaint.

32. Denies each and every allegation of paragraph 32 of the complaint.

33. Denies each and every allegation contained in paragraph 33 of the complaint, except that it admits that the Board of Directors of the Fund would not bring this action.

First Affirmative Defense

34. The Fund is an open-end diversified investment company of the management type, organized under the laws of the State of New York. The Fund's shares are registered under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq. The Fund is registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 et seq., and it conducts its business in compliance with said Acts and with the rules and regulations issued by the Securities and Exchange Commission thereunder.

35. The shares of the Fund are offered for sale to the public pursuant to registration statements which have duly become effective under the Securities Act of 1933, which registration statements include detailed prospectuses which are issued at least annually by the Fund. Each year the Fund delivers to its shareholders a proxy statement in connection with the annual meeting of shareholders at

which the shareholders vote for, among other things, the election of directors and approval of, among other things, the Investment Advisory Agreement between the Fund and Management Corporation.

36. All prospectuses and proxy statements of the Fund are submitted for examination and review to the Securities and Exchange Commission prior to release and distribution to prospective purchasers and holders of shares of the Fund.

37. Said prospectuses and proxy statements have at all times disclosed fully and fairly the terms of agreements between the Fund and Management Corporation, including the compensation paid by the Fund to Management Corporation for advisory and management services and the compensation paid to Oppenheimer & Co. for services, including underwriting and brokerage services. Such prospectuses and proxy statements disclose fully and fairly all material relationships among the Fund, its officers and directors, Management Corporation and Oppenheimer & Co.

38. The prospectus of the Fund, as supplemented on September 3, 1968, set forth the extent of the Fund's investments in investment letter securities and stated that the Fund would not make any investment which would cause more than 15% of the value of its assets to be invested in securities which are subject to legal or contractual restrictions on resale or are otherwise not readily saleable.

39. The Fund regularly publishes and distributes to its shareholders annual, semi-annual and quarterly reports,

which clearly and accurately set forth all payments made by the Fund to Management Corporation and to Oppenheimer & Co.

40. Upon information and belief, at or prior to the time plaintiff became a shareholder of the Fund he received a copy of the then current prospectus of the Fund, and since he became a shareholder he has received copies of all annual, semi-annual and quarterly reports of the Fund.

41. The Fund's semi-annual report to its shareholders for the period ending June 30, 1968, the quarterly report for September 30, 1968, the report for year ended December 31, 1968 and subsequent reports all set forth that the Fund had acquired securities under investment letters with restrictions on transfer or resale and that the valuation thereof had been determined by the Board of Directors of the Fund.

42. At no time during the period referred to in the complaint did the value of investment letter securities of the Fund exceed 10% of the value of all of the securities of the Fund.

43. To the extent that the value of the Fund's investments in investment letter securities may be deemed material, there was fair, adequate and timely disclosure thereof to the shareholders of the Fund.

SECOND AFFIRMATIVE DEFENSE

44. The Fund repeats and realleges each of the allegations contained in paragraphs 34 through 43, inclusive, of this answer as fully as if set out at length herein.

45. Section 2(a) (39) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a) (39), provides in relevant part that with respect to assets of registered investment companies the value of securities for which market quotations are readily available shall be the market value of such securities and the value of other securities and assets shall be the fair value as determined in good faith by the Board of Directors of the Investment Company. Rule 2a-4 of the General Rules and Regulations issued by the Securities and Exchange Commission under the Investment Company Act of 1940 provides in relevant part that in computing the price of Fund shares for the purpose of distribution, redemption and repurchase of portfolio securities for which market quotations are readily available shall be valued at current market value and other securities shall be valued at fair value as determined in good faith by the Board of Directors of the Fund.

46. At all times while the transferability of the securities referred to in the complaint herein was restricted, the value of each such security for the purposes referred to in the complaint was determined in good faith by the Board of Directors of the Fund, and such value was in each case the fair value thereof, in accordance with the requirements of the aforesaid statute and Rule.

Third Affirmative Defense

47. The Fund repeats and realleges each of the allegations contained in paragraphs 34 through 43, inclusive, of this answer as fully as if set out at length herein.

48. Upon information and belief, the plaintiff does not fairly and adequately represent the interests of the shareholders of the Fund for, among other things, the following reasons:

(a) The great majority of shareholders approved the purchases of the restricted securities referred to in the complaint and the valuation thereof by the Board of Directors of the Fund;

(b) The plaintiff's claims herein involve a conflict of interest in that he seeks to recover for himself and others damages for alleged overpayments which he and others made to the Fund while at the same time he seeks to sue derivatively on behalf of the Fund to recover alleged overpayments made by the Fund to others.

49. Upon information and belief, the plaintiff may not maintain this action derivatively on behalf of the Fund or representatively under Rule 23 of the Federal Rules of Civil Procedure on behalf of the shareholders of the Fund.

Fourth Affirmative Defense

50. The Fund repeats and realleges each of the allegations contained in paragraphs 34 through 43, inclusive, of this answer as fully as if set out at length herein.

51. Upon information and belief, at no time prior to the institution of this action did the plaintiff express to the defendants disapproval of the matters of which he now complains in the complaint herein.

52. Upon information and belief, the plaintiff and the shareholders of the Fund have acquiesced in and approved the matters and transactions alleged in the complaint, re-

ceived the benefits of the securities acquired by the Fund, and they have, therefore, waived the claims, if any, with respect thereto and are barred from complaining of said matters and transactions.

FIFTH AFFIRMATIVE DEFENSE

53. The Fund repeats and realleges each of the allegations contained in paragraphs 34 through 43, inclusive, of this answer as fully as if set out at length herein.

54. Shareholders of the Fund, including plaintiff, who purchased Fund shares subsequent to receipt of the Fund's semi-annual report for the period ending June 30, 1968 or of the Fund's prospectus as supplemented on September 3, 1968 had due notice that the Fund had acquired and might continue to acquire investment letter securities, and they are therefore estopped to assert any claims with respect to such securities acquired after such dates.

SIXTH AFFIRMATIVE DEFENSE

55. Upon information and belief, since March 15, 1968 plaintiff and/or members of the Purchasing Class have caused the Fund from time to time to redeem some or all of their Fund shares.

56. At all relevant times, the method of valuing Fund shares for purposes of redemption was the same as the method of valuing Fund shares for purposes of sale, and if restricted securities were overvalued in connection with sale of Fund shares as alleged by plaintiff, they were similarly overvalued in connection with redemption of Fund shares.

57. If the defendant Fund is liable to plaintiff and members of the Purchasing Class in connection with the purchase of Fund shares by reason of overvaluation of restricted securities in the portfolio of the Fund, then plaintiff and members of the Purchasing Class who have redeemed Fund shares since March 15, 1968 have received excessive amounts by reason of such alleged overvaluation of restricted securities and are liable to the defendant Fund to the extent thereof.

58. By reason of the foregoing, plaintiff and members of the Purchasing Class are or may be liable to the defendant Fund, wholly or in part, to the extent of the claims alleged in the complaint herein.

WHEREFORE, as to the plaintiff's asserted class action in Count One, the Fund demands judgment dismissing the complaint herein, together with the costs and disbursements of this action; and with respect to such action, if the Fund is liable to plaintiff or others (including but not limited to all persons similarly situated on whose behalf plaintiff acts as representative) by reason of overvaluation of restricted securities in the portfolio of the Fund, holding the plaintiff and all such others jointly and severally liable to defendant Fund for all amounts received by them or to which they are entitled to the extent that such amounts were based upon overvaluation of restricted securities in the portfolio of said Fund and setting off such amounts against any amounts for which defendant Fund may be liable to the plaintiff and all such others; and as to plaintiff's asserted derivative action in Count Two, the Fund, although of the view that this action is wholly without merit, leaves the disposition thereof to the Court; and as to both asserted causes of action the Fund requests such other, further and different relief as may be just.

Weisman, Celler, Spett,
Modlin & Wertheimer

By /s/ O. John Rogge
A Member of the Firm
Attorneys for Defendant
Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022
Telephone No.: (212) 371-5400

Amended Answer of Defendant Edmund T. Delaney

No. 69 Civ. 1242* **

UNITED STATES DISTRICT COURT

Southern District of New York

Irving Sanders,

Plaintiff,

—against—

Leon Levy, Jack Nash, Edmund T. Delaney, Emanuel Celler, Eric Hauser, Joseph M. McDaniel, Jr., Sidney M. Robbins, Oppenheimer Management Corporation, Oppenheimer & Company, and Oppenheimer Fund, Inc.,

Defendants.

Amended Answer of Defendant Edmund T. Delaney

1. Defendant denies, upon information and belief (except as to paragraphs "14" to "20" inclusive, which are denied on knowledge as to his own acts), the allegations of each numbered paragraph of the first cause of action of

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* The amended answers of this defendant to the complaints filed in 69 Civ. 2029 and 69 Civ. 2642 have not been included in the appendix herein. Relevant to these proceedings, the amended answer of this defendant to each of the respective complaints does not differ in any substantial way.

** Emanuel Celler, a defendant in this consolidated action, has not filed an answer in 69 Civ. 1242 on the grounds that he was not validly served in that action. Mr. Celler's amended answer in 69 Civ. 2029 and 69 Civ. 2642 are substantially identical to the amended answer of Mr. Delany in 69 Civ. 1242.

the complaint except to the extent specifically admitted or otherwise denied.

Paragraph	*Response*
1	Admits information that plaintiff is a shareholder as alleged except with respect to 4.196 shares purchased on June 21, 1968.
3	Admit only that this court has subject matter jurisdiction of claims properly predicated on the provisions of the cited statutes and the doctrine of pendent jurisdiction.
4-7	Admitted.
8	Admitted except that the shareholdings referred to therein are admitted only as of December 31, 1967.
9	Admitted.
10	Admitted except that Jack Nash is an Assistant Secretary and not the Secretary of Oppenheimer Management Corporation.
11	Admitted.
12	Admit only that the Fund filed a prospectus for the sale of its shares with the Securities and Exchange Commission which became effective on March 14, 1968 which was revised effective September 3, 1968 and that, since March 15, 1968, shares of the Fund have been sold by use of the mails and other instrumentalities of interstate commerce.
14	Admit, on information and belief, only that the Fund purchased the securities referred to therein subsequent to March 15, 1968.

2. Defendant reiterates and repeats each denial and admission to plaintiff's first cause of action and denies, upon information and belief (except as to paragraphs "27", "28", "30", "31" and "33" which are denied on knowledge as to his own acts), the allegations of each numbered paragraph of the second cause of action of the complaint except to the extent specifically admitted or otherwise denied as follows:

Paragraph	*Response*
24	Admits only that plaintiff purports to bring this suit derivatively as to the Fund.
25	Admits information that plaintiff is a shareholder as alleged except with respect to 4.196 shares purchased on June 21, 1968.
26	Admitted.

First Defense

3. The complaint fails to state any claim within the subject matter jurisdiction of this Court on which any relief can or should be granted.

Second Defense

4. The claims alleged in the complaint or some of them are barred, in whole or in part, by laches or the applicable statutes of limitations.

Third Defense

5. Plaintiff has failed, without justification or legal excuse, to make demand, before bringing this suit, upon either the directors or shareholders of Fund of the claim or claims alleged in the complaint to be asserted by or on behalf of the Fund.

FOURTH DEFENSE

6. At all material times, the Fund was an open-end, diversified, investment company of the management type, incorporated under the laws of the State of New York and registered with the Securities and Exchange Commission (the "Commission") under the Investment Company Act of 1940. The Fund's shares are registered under the Securities Act of 1933. The Fund conducts its business in compliance with said acts and with the rules and regulations issued thereunder by the Commission.

7. Shares of the Fund are offered for sale to the public only pursuant to prospectuses issued at least annually by the Fund. Each shareholder of Fund receives regularly an annual and semi-annual report of Fund as well as, at least annually, a proxy statement in connection with each annual meeting of its shareholders. In addition, it is the practice of the Fund to send to each shareholder a copy of its latest prospectus as the same becomes effective.

8. All such proxy statements and prospectuses have, prior to their release and delivery, been submitted for review and scrutiny by the Staff of the Commission.

9. At all material times, said prospectuses, reports and proxy statements have fully and fairly disclosed:

(a) All of the material relationships of and among the Fund, its officers and directors, Oppenheimer Management Corporation and Oppenheimer & Co.

(b) all payments made by the Fund to Oppenheimer Management Corporation and to Oppenheimer & Co.

(c) All material terms of the investment advisory agreements, sub-investment advisory agreements and underwriting agreements from time to time proposed or in force between and among the Fund, Oppenheimer Management Corporation and Oppenheimer & Co.

10. The Fund's semi-annual report to its shareholders for the period ending June 30, 1968, the quarterly report of the Fund as of September 30, 1968 and the annual report of the Fund for the year ended December 31, 1968, as well as the subsequent reports of the Fund all set forth that the Fund had acquired securities under letters of investment with restrictions on transfer or resale and that the valuation thereof had been determined by the directors of the Fund.

11. To the extent that the value of the Fund's investments in such securities may be deemed material, there was fair, adequate and timely disclosure thereof both to the shareholders of the Fund and to all purchasers of the Fund's shares.

FIFTH DEFENSE

12. The prospectus of the Fund, as supplemented on September 3, 1968, set forth the extent of the Fund's investments in securities pursuant to investment letters and stated that the Fund would not make any investment which would cause more than 15% of the value of its assets to be invested in such securities.

13. Plaintiff and all members of the class he purports to represent who purchased shares of the Fund subsequent to receipt of the Fund's semi-annual report for the period ending June 30, 1968 or of the Fund's prospectus as supplemented on September 3, 1968, had adequate and proper notice that the Fund had acquired and might continue to

acquire portfolio securities pursuant to investment letters and they are therefore estopped to assert any claim with respect to purchases of the Fund's shares subsequent to such notice.

Sixth Defense

14. Section 2(a)(3) of the Investment Company Act of 1940 provides, in relevant part, that the value of portfolio securities held by registered investment companies for which market quotations are readily available, shall be the market value of such securities and that the value of other portfolio securities and assets shall be the fair value thereof as determined in good faith by the Board of Directors of such registered investment company.

15. At all material times, the value of each portfolio security acquired by the Fund pursuant to a letter of investment as alleged in the complaint herein was fixed and determined in good faith by the directors of Fund and all computations of the net asset value of the securities and assets of the Fund for all purposes, including those alleged in the complaint herein, were based on the values so fixed and determined.

Seventh Defense

16. In the latter part of December 1967, the recommendation of Oppenheimer Management Corporation that the Fund invest a limited portion of its assets in securities which had not been registered for public distribution under the Securities Act of 1933 (provided such securities could be purchased under an agreement which would provide for their subsequent registration), was reviewed and approved by the Fund's Board of Directors, a majority of whom were neither officers, directors nor otherwise affiliated with Oppenheimer Management Corporation or Oppenheimer & Company.

17. Such decision and the other matters alleged in the complaint relate solely to the internal management of the Fund, to wit, the character, quality and suitability of securities to be acquired and held in its portfolio.

18. Upon information and belief, all investments by the Fund in unregistered securities have been within the limitations of such approval.

19. The aforesaid approval by the Board of Directors was a reasonable exercise of business judgment and such approval is binding upon the Fund and upon all of its shareholders, including plaintiff.

Eighth Defense

20. At the annual meeting of shareholders of the Fund held in the latter part of April 1969 after the dissemination and distribution of the aforesaid reports, prospectuses and proxy statements with the disclosures hereinabove described and after the distribution of a proxy statement for such meeting fully and fairly disclosing the institution of this action and the nature of the charges and contentions made therein, the directors of the Fund who had approved the policy of limited investments in unregistered securities and participated in the valuation of such securities were re-elected by an overwhelming plurality of the shareholders voting at such meeting in person or by proxy.

21. The shareholders of the Fund, including plaintiff, have approved and acquiesced in the matters and transactions which are the subject matter of the complaint and are barred and estopped from complaining of such matters and transactions.

NINTH DEFENSE

22. On information and belief, plaintiff does not fairly and adequately represent the interests either of the members of the class he purports to represent, the Fund, or its shareholders for, among other things, the following reasons:

(a) Plaintiff's claims herein involve a conflict of interest in that he seeks to recover primarily against the Fund, for himself and others, damages for alleged overpayments on the purchase of Fund's shares while, at the same time, he seeks to sue derivatively on behalf of the Fund to recover alleged overpayments made by the Fund to its investment adviser and redeeming shareholders; and

(b) A great majority of shareholders of the Fund approve the purchases and the policy of purchasing the unregistered securities referred to in the complaint and the valuation thereof by the directors of the Fund.

TENTH DEFENSE

23. Upon information and belief, since March 15, 1968 plaintiff and/or members of the Purchasing Class have caused the Fund from time to time to redeem some or all of their Fund shares.

24. At all relevant times, the method of valuing Fund shares for purposes of redemption was the same as the

method of valuing Fund shares for purposes of sale, and if restricted securities were overvalued in connection with sale of Fund shares as alleged by plaintiff, they were similarly overvalued in connection with redemption of Fund shares.

25. If defendant is liable to plaintiff and members of the Purchasing Class in connection with the purchase of Fund shares by reason of overvaluation of restricted securities in the portfolio of the Fund, then plaintiff and members of the Purchasing Class who have redeemed Fund shares since March 15, 1968 have received excessive amounts by reason of such alleged overvaluation of restricted securities and are liable to the defendant to the extent thereof.

26. By reason of the foregoing, plaintiff and members of the Purchasing Class are or may be liable to defendant, wholly or in part, to the extent of the claims alleged in the complaint herein.

ELEVENTH DEFENSE

27. After deduction of the sales charge, the price for Fund shares purchased by plaintiff and members of the Purchasing Class was paid to and received and retained by the Fund.

28. If defendant is liable to plaintiff and members of the Purchasing Class or to the Fund by reason of overvaluation of restricted securities in the portfolio of the Fund in connection with the sale or redemption, or both, of Fund shares, then the Fund is liable to defendant to the extent that the Fund has received excess amounts from plaintiff and members of the Purchasing Class by reason of such overvaluation.

29. By reason of the foregoing, the Fund is or may be liable to defendant, wholly or in part, to the extent of the claims alleged in the complaint here.

WHEREFORE, defendant demands judgment as follows:

1. Dismissing the complaint herein, together with the costs and disbursements of this action;

2. If defendant is liable to plaintiff or others (including but not limited to all persons similarly situated on whose behalf plaintiff acts as representative and defendant Oppenheimer Fund, Inc.) by reason of overvaluation of restricted securities in the portfolio of said Fund, holding the plaintiff and all such other jointly and severally liable to defendant for all amounts received by them or to which they are entitled to the extent that such amounts were based upon overvaluation of restricted securities in the portfolio of said Fund and setting off such amounts against any amounts for which defendant may be liable to the plaintiff and all such others; and

3. Granting defendant such other, further and different relief as may be just.

Dated: New York, N.Y.
June 22, 1973

TOWNSEND & LEWIS
By /s/ JOHN F. DAVIDSON
A Member of the Firm
Attorneys for Defendant
Edmund T. Delaney
Office and P.O. Address
120 Broadway
New York, N.Y. 10005
Telephone: (212) 267-6180

Answers of Defendants Oppenheimer Management Corp., et al., to Plaintiffs' Supplementary Interrogatories

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civil 1242

IRVING SANDERS,
Plaintiff,
—against—
LEON LEVY, et al.,
Defendants.

EGON TAUSSIG,
Plaintiff,
—against—
SIDNEY M. ROBBINS, et al.,
Defendants.

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs,
—against—
ERIC HAUSER, et al.,
Defendants.

Defendants, Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash, answer plaintiff's supplementary interrogatories dated February 27, 1973, upon information and belief as follows:

1. Interrogatory 1. The number of shares of Oppenheimer Fund ("Fund") sold, and the number of shares the Fund redeemed on each business day between March 15, 1968 and December 31, 1970 are set forth in column 2 entitled daily subscriptions and in column 3 entitled daily redemptions of the annexed schedule which is marked Exhibit 1 and is made a part hereof.

2. Interrogatory 2. The total number of shares of the Fund outstanding and the value of the net assets of the Fund as of the close of the New York Stock Exchange on each business day between March 15, 1968 and December 31, 1970, are set forth in columns 4 and 5 of Exhibit 1.

• • • • •

Dated: New York, New York
March 29, 1973

OPPENHEIMER MANAGEMENT CORPORATION

By /s/ ROBERT G. GALLI
Robert G. Galli, Administrative
Vice President and Secretary

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ROBERT G. GALLI, being duly sworn, deposes and says, that he is the Administrative Vice President and Secretary of Oppenheimer Management Corporation; that he has read the foregoing answers to plaintiff's interrogatories and knows the contents thereof; that the same are true to deponent's knowledge, except as to matters therein stated to be alleged upon information and belief and as to those deponent believes them to be true.

/s/ ROBERT G. GALLI
Robert G. Galli

[Sworn to March 29, 1973]

Defendants Oppenheimer & Co. Leon Levy and Jack Nash adopt the answers to plaintiff's supplementary interrogatories herein, and agree that they will be bound by the same.

March 29, 1973

OPPENHEIMER & CO.

By: /s/ JACK NASH

/s/ LEON LEVY
Leon Levy

/s/ JACK NASH
Jack Nash

Answer of Defendants Oppenheimer Management Corp., et al., to Plaintiffs' Supplementary Interrogatories

EXHIBIT 1

OPPENHEIMER FUND INC.

Date	Capital Daily Subscriptions	Stock Daily Redemptions	Outstanding Shares	Total Net Assets
March 1968				
* * * * *				
28	18,549	16,364	20,743,192	$148,783,980.67
* * * * *				
November 1969				
* * * * *				
7	58,170	14,000	39,776,879	333,594,812.00
* * * * *				
April 1970				
* * * * *				
24	65,533	17,696	45,072,096	294,215,334.87
* * * * *				

Interrogatories dated February 7, 1973 of Defendants Oppenheimer Management Corp., et al., Directed to Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE that the plaintiffs are required to serve and file pursuant to Rule 33 of the Federal Rules of Civil Procedure their separate answers under oath to the following interrogatories:

1. With respect to the plaintiff Irving Sanders:

    (a) What is his residence address?

    (b) What is his business address?

    (c) What is his occupation?

2. With respect to the plaintiff Egon Taussig:

    (a) What is his residence address?

    (b) What is his business address?

    (c) What is his occupation?

3. With respect to plaintiffs Michael Shaev and Rita Shaev:

    (a) What are their residence addresses?

    (b) What are their business addresses?

    (c) What are their occupations?

4. With respect to shares of stock of the defendant Oppenheimer Fund, Inc. (hereinafter referred to as the "Fund") purchased by the plaintiffs Irving Sanders, Egon Taussig, Michael Shaev and Rita Shaev, stated separately as to each plaintiff:

(a) What was the exact number of shares of the Fund in which the plaintiffs had a beneficial interest in whole or in part, at the time of commencement of this action, and in what name or names were said shares registered?

(b) When did the plaintiffs first acquire a beneficial interest in shares of the Fund, stating the number of such shares, the price paid for such shares, the name or names in which said shares were registered and the name and address of the dealer or other sellers from whom such shares were purchased?

(c) Were any shares of the Fund subsequently acquired? If so, state the date of each such acquisition, the number of shares in each such acquisition, the name or names in which said shares were registered, specifying in each case the basis of the acquisition (i.e., whether by purchase, dividend, capital gain distribution, gift, etc.), and as to each purchase, the price paid thereof and the name and address of the dealer or other seller from whom such shares were purchased.

(d) Do the plaintiffs have any beneficial interest in any shares of the Fund held in any name other than theirs? If so, state the nature of plaintiffs' interest,

the number of shares, and the name or names in which such shares are registered.

5. Have the plaintiffs, Irving Sanders, Egon Taussig, Michael Shaev and Rita Shaev (hereinafter referred to as "plaintiffs") at any time since they acquired an interest in shares of the Fund sold or required the Fund to redeem any of their shares of the Fund? If so, as to each plaintiff state the date when each such sale or redemption was effected, the number of shares sold or redeemed, and the price realized on each such sale or redemption.

* * * * *

Dated: New York, N.Y.
February 7, 1973

Guggenheimer & Untermyer
Attorneys for Defendants
Oppenheimer Management Corporation, Oppenheimer & Co.,
Leon Levy and Jack Nash
80 Pine Street
New York, N.Y.
Telephone 344-2040

Plaintiff Sanders' Answers to Defendants' Interrogatories Verified March 27, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff Sanders answers the defendants' interrogatories dated February 7, 1973, upon information and belief except as to interrogatories 1 through 10 which are answered upon knowledge as follows:

1(a) 5009 Broadway, New York, New York.

(b) None.

(c) Retired.

2. Not applicable.

3. Not applicable.

4(a) 209.825 shares; Irving Sanders.

(b) I purchased 2.71 shares in my name at $22.70 per share on December 23, 1966, through Bassuk Mutual Service Corp.

(c) I subsequently purchased of Oppenheimer Fund ("the Fund") in my name through Bassuk Mutual Service Corp. and its successors-in-interest as follows:

Date of Acquisition	*No. of Shares Acquired*	*Price Per Share*	*Basis of Acquisition*
1/23/67	11.305	$24.26	Purchase
1/31/67	.627	23.65	Cap Gain
2/24/67	1.991	23.73	Purchase
3/31/67	1.918	24.63	Purchase
4/28/67	1.822	25.94	Purchase
5/29/67	1.849	25.55	Purchase
6/28/67	1.800	26.25	Purchase
6/30/67	.274	25.73	Cap Gain
6/30/67	.018	25.73	Inc Divd
8/3/67	1.675	27.76	Purchase
8/29/67	1.809	26.54	Purchase
9/28/67	1.731	27.29	Purchase
10/31/67	1.733	27.27	Purchase
11/29/67	1.726	27.37	Purchase
1/2/68	1.636	28.42	Purchase
1/22/68	1.723	27.86	Purchase
1/31/68	5.619	22.94	Cap Gain
1/31/68	82.678		Stock Div
2/28/68	6.553	7.21	Purchase
3/29/68	6.526	7.24	Purchase
5/1/68	5.657	8.22	Purchase
5/28/68	5.607	8.56	Purchase
6/21/68	4.196	8.84	Cap Gain
6/28/68	5.456	8.66	Purchase
7/30/68	5.720	8.26	Purchase
8/29/68	5.585	8.46	Purchase
9/27/68	5.059	9.34	Purchase
10/31/68	5.053	9.35	Purchase
12/5/68	4.609	10.09	Purchase

Acquisition Date of	*No. of Shares Acquired*	*Price Per Share*	*Basis of Acquisition*
1/3/69	4.817	9.81	Purchase
1/29/69	4.984	9.63	Purchase
1/31/69	10.523	9.21	Cap Gain
3/3/69	5.678	8.19	Purchase
4/7/69	5.686	8.31	Purchase
4/30/69	5.275	9.10	Purchase
5/29/69	5.369	8.80	Purchase
6/20/69	1.164	7.77	Inc Divd
6/20/69	4.075	7.77	Cap Gain
7/1/69	5.871	7.92	Purchase
6/19/70	3.293	6.10	Inc Divd
2/29/72	.684	9.36	Inc Divd
2/29/72	.448	9.36	Cap Gain
2/5/73	.454	8.16	Ind Divd
2/5/73	2.932	8.16	Cap Gain

(d) No.

5. I redeemed 200 shares of the Fund on April 30, 1971, at $8.87 per share.

* * * * *

/s/ Irving Sanders
Irving Sanders

Dated: New York, N.Y.
March 27, 1973

State of New York,
County of New York, *ss.:*

Irving Sanders, being duly sworn, deposes and says that he is one of the plaintiffs in the above action; that he has read the foregoing answers to defendants' interrogatories and knows the contents thereof; that the same are true to deponent's knowledge except as to matters therein stated upon information and belief and as to those, deponent believes them to be true.

/s/ Irving Sanders
Irving Sanders

[Sworn to March 27, 1973]

Plaintiff Shaevs' Answers to Defendants' Interrogatories Verified March 30, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs Shaev answer the defendants interrogatories dated February 7, 1973, upon information and belief except as to interrogatories 1 through 10 which are alleged upon knowledge as follows:

1. Not applicable.

2. Not applicable.

3(a) 19 Twin Rivers Drive, North East Windsor, New Jersey.

(b) Michael Shaev—247 Huyler Street, South Hackensack, New Jersey.

(c) Michael Shaev—printer; Rita Shaev—housewife.

4(a) 45.071 shares—Michael Shaev and Rita Shaev as joint tenants.

(b) We purchased 22.599 shares in our joint names at $8.85 per share on April 24, 1968 through Kurz-Liebow & Co., Inc.

(c) We subsequently purchased shares of Oppenheimer Fund ("the Fund") in our joint names through Kurz-Liebow & Co., Inc. as follows:

Plaintiffs Shaevs' Answers to Defendants' Interrogatories Verified March 30, 1973

Date of Acquisition	*No. of Shares Acquired*	*Price Per Share*	*Basis of Acquisition*
6/21/68	.639	$ 8.84	Cap. gain $0.25
10/ 1/68	19.512	10.25	Purchase
1/31/69	2.321	9.21	Cap. gain $0.50
6/20/69	.812	7.77	Cap. gain $0.14
6/20/69	.232	7.77	Inc. Divd $0.04
6/19/70	.643	6.10	Inc. Divd $0.08
2/26/71	1.179	7.93	Inc. Divd $0.20

(d) No.

5. We redeemed 40 shares of the Fund on September 29, 1971 at $8.61 per share.

• • • • •

Dated: New York, New York
March 30, 1973

/s/ MICHAEL SHAEV
Michael Shaev

Plaintiffs Shaevs' Answers to Defendants' Interrogatories Verified March 30, 1973

State of New York,
County of New York, ss.:

Michael Shaev, being duly sworn, deposes and says that he is one of the plaintiffs in the above action; that he has read the foregoing answers to defendants' interrogatories and knows the contents thereof; that the same are true to deponent's knowledge except as to matters therein stated upon information and belief and as to those, deponent believes them to be true.

/s/ Michael Shaev
Michael Shaev

[Sworn to March 30, 1973]

Plaintiff Taussig's Answers to Defendants' Interrogatories Verified April 9, 1973

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

Plaintiff Taussig answers the defendants interrogatories dated February 7, 1973, upon information and belief except as to interrogatories 1 through 10 which are alleged upon knowledge as follows:

1. Not applicable.

2.(a) 3905 Point East Drive, North Miami Beach, Florida.

(b) Retired.

(c) Retired.

3. Not applicable.

4.(a) 2369.365 shares—Egon Taussig.

(b) I purchased 2302.026 shares in my name at $10.86 per share on December 24, 1968 through Equity Funding Securities Corp.

(c) I subsequently purchased shares of Oppenheimer Fund ("the Fund") in my name through Equity Funding Securities Corp. as follows:

Date of Acquisition	*No. of Shares Acquired*	*Price Per Share*	*Basis of Acquisition*
1/31/69	124.974	$9.21	Cap. Gain
6/20/69	40.626	7.77	Cap. Gain
6/20/69	11.607	7.77	Inc. Divd
6/19/70	29.282	6.10	Inc. Divd
2/26/71	50.101	7.93	Inc. Divd
2/5/73	18.163	8.16	Inc. Divd
2/5/73	117.197	8.16	Cap. Gain

(d) No.

5. I redeemed shares of the Fund as follows:

Date	*No. of Shares Redeemed*	*Price Per Share*
2/11/69	13.736	$9.10
3/10/69	15.188	8.23
4/8/69	14.899	8.39
5/8/69	13.812	9.05
5/15/69	100.000	9.00
6/9/69	14.620	8.55
7/8/69	15.783	7.92
8/7/69	16.447	7.60
9/8/69	16.534	7.56
10/7/69	15.883	7.87
11/7/69	14.899	8.39
12/8/69	16.426	7.61
1/8/70	16.383	7.63
2/9/70	17.756	7.04
3/6/70	17.313	7.22
4/7/70	17.781	7.03

Date	*No. of Shares Redeemed*	*Price Per Share*
5/8/70	19.968	6.26
6/8/70	20.392	6.13
7/15/70	21.368	5.85
8/6/70	19.778	6.32
9/9/70	18.519	6.75
10/8/70	17.680	7.07
11/9/70	17.986	6.95
12/7/70	16.938	7.38
1/7/71	16.404	7.62
2/5/71	15.509	8.06
3/8/71	15.300	8.17
4/7/71	14.706	8.50
5/10/71	14.318	8.73
6/9/71	14.302	8.74
7/12/71	14.124	8.85
8/9/71	15.356	8.14
9/9/71	13.998	8.93
10/11/71	14.108	8.86
11/9/71	14.881	8.40
12/9/71	14.451	8.65
1/11/72	13.661	9.15
2/9/72	13.284	9.41
3/9/72	12.887	9.70
4/11/72	12.513	9.99
5/9/72	13.528	9.24
6/9/72	13.499	9.26
7/11/72	13.587	9.20
8/9/72	13.383	9.34
9/11/72	13.873	9.01
10/10/72	14.205	8.80

Plaintiff Taussig's Answers to Defendants' Interrogatories Verified April 9, 1973

Date	*No. of Shares Redeemed*	*Price Per Share*
11/9/72	13.767	9.08
12/11/72	12.860	9.72
1/9/73	12.994	9.62
2/9/73	15.281	8.18

• • • • •

Dated: New York, New York
April 9, 1973

/s/ Egon Taussig
Egon Taussig

State of Florida,
County of Dade, *ss.*:

Egon Taussig, being duly sworn, deposes and says that he is one of the plaintiffs in the above action; that he has read the foregoing answers to defendants' interrogatories and knows the contents thereof; that the same are true to deponent's knowledge except as to matters therein stated upon information and belief and as to those, deponent believes them to be true.

/s/ Egon Taussig
Egon Taussig

[Sworn to April 9, 1973]

Plaintiffs' Notice of Motion for Class Action Treatment dated March 30, 1973

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

Please Take Notice, that upon the affidavit of Donald N. Ruby, sworn to March 30, 1973, and upon the pleadings and all prior proceedings herein, the undersigned will move this Court in Court Room 607-H of the United States Court House, Foley Square, New York, New York, on the 18th day of April, 1973, at 10:00 A.M. or as soon thereafter as counsel can be heard for an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, declaring that this consolidated action be maintained as a class action, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 30, 1973

Yours, etc.

Wolf Popper Ross Wolf & Jones

By Donald N. Ruby
A Member of the Firm
General Counsel for Plaintiffs
845 Third Avenue
New York, New York 10022
PL 9-4600

Plaintiffs' Notice of Motion for Class Action Treatment dated March 30, 1973

To:

Guggenheimer & Untermyer
Attorneys for Oppenheimer Management
Corporation, Oppenheimer & Company,
Leon Levy and Jack Nash
80 Pine Street
New York, New York 10005

Weisman Celler Allan Spett
Sheinberg, Esqs.
Attorneys for Oppenheimer Fund, Inc.
1501 Broadway
New York, New York 10036

Townsend & Lewis
Attorneys for Edmund Delaney, et al.
120 Broadway
New York, New York 10005

Supporting Affidavit of Donald N. Ruby

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

State of New York,
County of New York, *ss.:*

Donald N. Ruby, being duly sworn, deposes and says:

1. I am a member of the firm of Wolf Popper Ross Wolf & Jones, general counsel for the plaintiffs in this consolidated action. This affidavit is submitted in support of the plaintiffs' motion for an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, declaring that this consolidated action may be maintained as a class suit on behalf of persons who purchased shares of Oppenheimer Fund ("the Fund") during the period March 28, 1968 to April 24, 1970.

2. The *Sanders* action was commenced on March 26, 1969, and the Taussig and Shaev actions were commenced on May 12, 1969 and June 18, 1969, respectively. Said actions were brought by plaintiffs representatively on behalf of themselves and other persons similarly situated who purchased shares of the Fund since March, 1968, and derivatively on behalf of the Fund. Said actions are based upon violations of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940 and Rules promulgated thereunder and are brought against Oppenheimer Management Corporation ("the

Manager") which is the investment adviser to the Fund and the general distributor of its shares, Oppenheimer & Company which owns all the voting stock of the Manager and the directors of the Fund.

3. The complaints in said actions allege, in substance, that the defendants other than the Fund caused the Fund to issue prospectuses which were false and misleading in that, among other things, they failed to state that the Fund would purchase restricted securities and the risks involved with respect to the purchase of restricted securities and they stated that the Fund's shares were being offered at net asset value which was not the case as a result of the improper valuation by the defendants of restricted securities in the portfolio of the Fund; that the defendants caused the Fund to issue periodic reports which were false and misleading in connection with the valuation of restricted securities in the portfolio of the Fund, and the net asset value of shares of the Fund; that the defendants other than the Fund caused the Fund to improperly value the restricted securities in the Fund's portfolio in violation of the Investment Company Act, the Securities Exchange Act and the Securities Act, and that the plaintiffs and other persons similarly situated who purchased shares of the Fund since March, 1968 were caused to pay false and inflated prices for their shares of the Fund as a result thereof. The plaintiffs seek to recover damages for themselves and other persons similarly situated for overpayments on purchases of shares of the Fund. The complaints further charge that as a result of the improper valuation of restricted securities in the Fund's portfolio, the Fund was caused to pay the Manager excessive fees under its management agreement and to redeem shares at inflated prices,

thereby wasting the Fund's assets. The plaintiffs also seek to recover on behalf of the Fund the damages sustained by the Fund and the profits made by the defendants as a result of the transactions complained of in said complaints.

4. On November 17, 1969, the defendants moved for an order pursuant to Rule 42(a) of the Federal Rules of Civil Procedure consolidating said actions on the ground that they involved common questions of law and fact, appointing a general counsel for the plaintiffs and enjoining any further actions for similar relief based upon claims which were the same or similar to those asserted in said three actions. On December 17, 1969, by Order of Judge Thomas F. Croake, said actions were consolidated for all purposes, the firm of Wolf Popper Ross Wolf & Jones, Esqs. was appointed general counsel for the plaintiffs and all persons claiming to be or to have been stockholders of the Fund were enjoined from commencing any other or further actions for any of the relief sought in said actions or for a determination of any question of law or fact raised therein, except by means of intervention if permitted by the Court.

5. The plaintiffs have conducted extensive discovery proceedings including the service of two sets of interrogatories, the examination of numerous documents and the oral examination of several officers and directors of the Fund and the Manager. Plaintiffs believe that the evidence obtained during the discovery proceedings firmly supports the claims made by them on behalf of themselves and other persons similarly situated in this consolidated action and clearly shows that the defendants violated the Investment Company Act and the Securities Exchange Act as claimed

herein. Accordingly, the plaintiffs intend to move for summary judgment on the issue of liability.

6. The plaintiffs respectfully submit that this Court should determine that this consolidated action may be maintained as a class action since the plaintiffs have satisfied the requirements of Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure. The requirements of Rule 23 are discussed in detail in the plaintiffs' memorandum of law and will not be repeated at length herein. However, I will briefly in this affidavit refer to some of the matters relating thereto.

7. There can be no dispute that the class is so numerous that joinder of all members is impracticable. It appears from the reports issued by the Fund that there are at least 50,000 persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970, and allegedly paid false and inflated prices for their shares as a result of the defendants' improper evaluation of restricted securities in the portfolio of the Fund. March 28, 1968 is the first day restricted securities were included in the Fund's portfolio, and April 24, 1970 is the date of the prospectus in which the defendants for the first time disclosed to the investing public the methods used by them in valuing restricted securities in the portfolio of the Fund and certain information relating thereto.

8. There can also be little doubt that there are common questions of law and fact which warrant the maintenance of this consolidated action as a class suit. Indeed, the basis for the Court in having previously consolidated these actions and having enjoined any additional actions from being brought by members of the class was the recognition

that the claims of the members of the class were based upon common issues of law and fact. These common questions of law and fact include the following:

(a) Whether the prospectuses issued by the Fund during the period in question were false and misleading in that they failed to state that the Fund would purchase restricted securities;

(b) Whether the prospectuses were false and misleading because of their failure to state the risks involved with respect to the purchase of restricted securities;

(c) Whether the prospectuses were false and misleading in failing to state the methods utilized by defendants in valuating the restricted securities;

(d) Whether the prospectuses were false and misleading in stating that the Fund's shares were being offered at net asset value, when a "good faith" determination of the value of restricted securities of the Fund was not made;

(e) Whether the periodic reports issued by the Fund were false and misleading in failing to disclose the methods used in valuing restricted securities in the portfolio of the Fund and information relating thereto and with regard to the net asset value of shares of the Fund and the investment performance of the Fund;

(f) Whether it was improper and a violation of the Investment Company Act Section 2(a)(41) and Rule 2a-4 thereunder and Rule 10b-5 for defendants to have valued restricted securities in the Fund portfolio by applying an absolute dollar discount to the market quotations for unrestricted securities of the same class, without regard to other relevant factors;

(g) Whether it was improper and a violation of the Investment Company Act Section 2(a)(41) and Rule 2a-4 thereunder, and Rule 10b-5 for defendants to have valued the convertible notes in the Fund's portfolio by assuming a constant percentage premium over the conversion value of the common stock into which said notes were convertible, without regard to other relevant factors and by automatically assuming that said premium would equal the discount attributable to the fact that said securities were restricted without regard to other relevant factors;

(h) Whether it was improper and a violation of the Investment Company Act Section 2(a)(41) (formerly Section 2(a)(39)) and Rule 2a-4 thereunder, and Rule 10b-5 for defendants to have valued restricted securities in the Fund's portfolio by applying a constant percentage discount to the market quotations for unrestricted securities of the same class, without regard to other relevant factors; and

(i) Whether the methods used by defendants in valuing restricted securities in the Fund's portfolio satisfied the requirements of Section 2(a)(41) and Rule 2a-4 that restricted securities be valued at fair value as determined in "good faith" by the board of directors and, if not, whether defendants are liable to the class for having violated the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940.

9. The claims of the plaintiffs are typical of the class. Plaintiff Sanders purchased shares on numerous occasions throughout the period involved from March 28, 1968 to April 24, 1970, and plaintiffs Taussig and Shaev also purchased shares of the Fund on several occasions during this period. All of the aforesaid purchases were allegedly made

at false and inflated prices as a result of the defendants' improper valuation of restricted securities in the portfolio of the Fund.

10. As shown in our accompanying memorandum of law, two factors of great importance in determining whether the plaintiffs will "fairly and adequately protect the interests of the class" as required by Rule 23, are whether the plaintiffs will vigorously prosecute the litigation and whether their attorneys are qualified, experienced and generally able to conduct the litigation. It is evident from the extensive discovery proceedings which have already taken place that the plaintiffs have vigorously prosecuted this action. Furthermore, I respectfully submit to the Court that our firm, as general counsel for the plaintiffs, possesses the qualifications necessary to properly represent the interests of the class in this action. We have had considerable experience in the field of corporate practice and, in particular, in stockholder's actions. The other members of my firm and I have tried and argued cases in the federal courts including the Supreme Court of the United States, in the New York State Courts and the courts of a number of other states. I take the liberty of bringing the following specific matters to the attention of the Court.

11. On March 17, 1971, Judge Milton Pollack, presiding at a settlement hearing in a derivative action entitled *Zerkle, et al.* v. *Cleveland-Cliffs Iron Co., et al.*, 70 Civ 2507, made the following comment about our firm:

> "I know of your standing in the community and also your standing at the Bar, and have a very high opinion of the expert knowledge, competence and fairness with which you conduct derivative litigation."

12. In a series of class actions entitled *Berland* v. *Great American Industries, et al.,* 66 Civ. 1755, et al., Judge Mansfield appointed our firm as General Counsel for all the plaintiffs. Thereafter, in deciding a motion to declare the consolidated action as a class action, Judge Mansfield had occasion to refer to his earlier appointment of our firm as General Counsel for the consolidated action. In that connection, in his opinion (48 F.R.D. 121 (S.D.N.Y. 1969)), he said about our firm's representation of the plaintiffs (at p. 127):

> "They are represented by outstanding counsel who are experienced in the conduct of stockholders' litigation and aware of their responsibilities."

He added (at p. 127):

> "We are satisfied, therefore, that both plaintiffs and their counsel would adequately represent the class in that there is no likelihood that they would handle or dispose of the litigation in a collusive manner or act in any way antagonistic to the interests of the class."

At a later point (at p. 128) he referred to our firm as the plaintiffs' "high-calibre, experienced counsel." The actions were recently settled with substantial benefits gained by the members of the class.

13. Finally, it is clear that a class action is superior to any other available method for the fair and efficient adjudication of this controversy. Indeed, since the damages to any single member of the class may be insufficient to justify the commencement of a separate action for the relief sought herein, a class action is no doubt the only meaningful method by which the rights of the members of the class

can be effectively enforced. Moreover, it is evident from the Order of consolidation enjoining any further actions by members of the class that it was contemplated that the plaintiffs in these actions would represent the interests of other members of the class and that the claims of other members of the class would be enforced through the maintenance of this action as a class suit.

14. With respect to the question of notice to the members of the class, we assume that the defendants have the names and addresses of the persons who purchased shares of the Fund during the period involved and that an appropriate notice can be sent to these persons in one of the regular mailings which the Fund makes to its shareholders.

15. We respectfully submit that in accordance with the authorities set forth in our memorandum of law any costs relating to the notice such as the preparation of the notice should be paid by the defendants since the defendants are better able to bear the cost of the notice, the defendants, in obtaining an order enjoining any other members of the class from bringing similar actions against them, clearly evidenced a desire to have this action maintained as a class action and to have the rights of all members of the class determined herein and the claims asserted against the defendants herein for violation of the Investment Company Act and the Securities Exchange Act are well founded as plaintiffs will show on their motion for summary judgment on the issue of liability. We respectfully suggest, however, that the Court defer a determination as to who should pay for the costs of notice or how the costs should be allocated between the parties pending the submission of plaintiffs' motion for summary judgment on the issue of liability. The Court will, no doubt, be in a better position to make a de-

termination on this question after a review of the papers submitted in connection with said motion.

16. We respectfully submit that it would be a fair exercise of discretion for this Court under the circumstances in this case to require the defendants to pay the cost of notice to the members of the class, particularly if the Court concludes after reviewing the papers submitted in connection with plaintiffs' motion for summary judgment on the issue of liability that the plaintiffs' claims have substantial merit.

17. It is respectfully submitted that the plaintiffs' motion for an order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, determining that this action may be maintained as a class action on behalf of the persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970, should be granted.

/s/ Donald N. Ruby

[Sworn to March 30, 1973]

Affidavit of Leon H. Tykulsker Sworn to April 13, 1973

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

State of New York,
County of New York, *ss.*:

Leon H. Tykulsker, being duly sworn, says:

1. I am a member of the firm of Guggenheimer & Untermyer, attorneys for defendants Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash (herein called the "Oppenheimer Defendants"). I make this affidavit in connection with plaintiffs' motion for an order pursuant to Rule 23(c)(1) FRCP to authorize maintenance of the consolidated action as a class suit on behalf of persons who purchased shares of stock of defendant Oppenheimer Fund, Inc. (the "Fund") during the period March 28, 1968 to April 24, 1970.

Context in Which Actions Arise

2. This consolidated action is brought in connection with plaintiffs' claims that the Board of Directors of the Fund overvalued restricted securities in the portfolio of the Fund and that adequate disclosure with respect to such restricted securities was not made by the Fund. The Fund is an open-end investment company registered under the Investment Company Act of 1940. Its shares are registered under the Securities Act of 1933. Fund shares are offered

for sale and sold continuously by the Fund. Shareholders who wish to liquidate their interests do so by selling the shares back to the Fund.

3. Among shareholder accounts of the Fund is the Oppenheimer Systematic Capital Accumulation Program ("OSCAP"). OSCAP is also an investment company registered under the Investment Company Act of 1940 but it is an investment company of the unit investment trust type. It is organized as a custodianship, with State Street Bank and Trust Company of Boston, Massachusetts, as the Custodian. OSCAP does not have a Board of Directors and it issues "plans" to participants, each of which represents an undivided interest in units of Fund shares. When the account of the OSCAP planholder is liquidated, the Custodian sells the Fund shares to the Fund and the proceeds are credited to the OSCAP planholder.

4. As of March 31, 1973 the Fund had under management net assets of approximately $523,243,571. As of said date there were 67,726,541 shares of the Fund outstanding owned by approximately 86,063 shareholder accounts and by OSCAP for 87,894 accounts of OSCAP planholders. The net asset value per share was $7.72. As of said date the plaintiffs Shaev owned 8+ (a fraction) shares, plaintiff Taussig owned 1,868+ shares, and plaintiff Sanders had credited to his account as a planholder of OSCAP 46+ shares.

5. During the period from March 26, 1969 through June 18, 1969, when plaintiffs instituted their respective actions the number of Fund shares outstanding ranged from approximately 30,995,000 to 33,750,000 shares. The number of shares which plaintiffs owned or had an interest in as of the date they instituted their respective actions were as follows:

Plaintiffs	*Date action instituted*	*No. of Shares*
Sanders	March 26, 1969	209.823[*]
Taussig	May 12, 1969	2369.365
Shaev	June 18, 1969	45.071

6. During the period which plaintiffs propose to include in their class action (March 28, 1968 to April 24, 1970), the alleged overvaluation of restricted securities constituted a relatively insignificant segment of the portfolio of the Fund. We do not know the details of plaintiffs' claims as to overvaluation, since they have failed to answer the interrogatories on this subject propounded by the Oppenheimer Defendants. If it be assumed that plaintiffs claim an overvaluation of as much as 10%, the amount involved is well below 1% of the Fund's assets. The relative amounts involved can be seen from the following table (derived from quarterly reports to Fund shareholders and rounding off the thousands):

Date	Net Assets of Fund	Fund Valuation of Restricted Securities	10% of Fund Valuation of Restricted Securities	
			Amount	Percentage of Fund Assets
Mar. 31, 1968	$150,577,000	$ 1,005,000	$ 100,000	1/15 of 1%
Sept. 30, 1968	232,083,000	19,491,000	1,949,000	4/5 of 1%
Mar. 31, 1969	265,279,000	8,453,000	845,000	3/10 of 1%
Sept. 30, 1969	298,899,000	7,033,000	703,000	3/10 of 1%
Mar. 30, 1970	315,229,140	3,073,000	307,000	1/10 of 1%

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[*] Number of shares in which interested under OSCAP plan.

Notice

13. Plaintiffs seek to maintain this consolidated action a class action pursuant to FRCP Rule 23(b)(3). Rule 23 (c)(2) requires that in any class action maintained under subdivision (b)(3), the Court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

14. The effort and expense involved in ascertaining and giving notice to members of the class in the instant action can be expected to be considerable. I am informed that during the period designated by plaintiffs (namely, March 28, 1968 to April 24, 1970) there were approximately 121,000 shareholder accounts which purchased Fund shares. Of this total, approximately 41,400 were new shareholder accounts of the Fund, approximately 54,600 were new purchasers of OSCAP plans, and approximately 25,000 were existing shareholder accounts of the Fund or existing holders of OSCAP plans. Obviously there would be a significant decrease in the numbers of shareholders accounts involved if the relevant period were deemed to terminate on a date earlier than that proposed by plaintiffs.

15. The expense of giving notice to members of the class can be expected to be considerable in view of the size of the class—namely, approximately 121,000 accounts. Plaintiff's counsel offhandedly states in his moving affidavit (at p. 14) that he "assumes" the defendants have the names and addresses of the persons who purchased shares of the Fund during the period involved and that an appropriate notice can be sent to them in one of the regular mailings which the Fund makes to its shareholders. However, in fact it will require considerable labor and expense to ascertain the names and addresses of all such purchasers, since the current list of shareholders of the Fund includes many who are not members of the class and a considerable number of members of the class are probably no longer current shareholders. Moreover, mailing a notice, as suggested by plaintiff's counsel, to current shareholders is objectionable on a number of grounds. First, such notice will not reach members of the class who are no longer shareholders. Second, such notice will be received by many shareholders who are not members of the class and is likely to cause substantial damage to the Fund and its shareholders; such a notice may well panic unsophisticated shareholders into believing their investments are endangered with consequent large scale requests for the Fund to redeem. Third, the cost of a mailing to current shareholders will be substantial. I am informed that a single letter mailing to current 174,000 shareholder accounts will cost about $21,300, which amount includes postage but does not include the cost of printing the notice.

16. Not unexpectedly, plaintiff's counsel urges that the cost of any notice to the class should be borne by the defendants. His contentions in this respect are without merit. As set forth in the memorandum of law submitted on behalf of the Oppenheimer Defendants, the cost of a class action notice is normally to be borne by plaintiffs, since they have initiated the litigation. Defendants have already been put to very considerable expense in connection with these litigations—not only for legal services but also in terms of executive time required to meet the dis-

covery demands of plaintiffs. Plaintiffs' cavalier approach to such expenses is evidenced by their contention that notice costs should be paid by the defendants because they are better able to bear them. (Plaintiffs' Moving Affidavit, p. 15). Only after plaintiffs have adequately established that there is a substantial likelihood that they will prevail have some courts given this any consideration at all.

17. In this connection, as shown in our memorandum of law, courts have been concerned that costs should not be paid in the first instance by defendants where there is no showing that plaintiffs will be able to reimburse the defendants in the event plaintiffs should not prevail. No such showing of financial responsibility of the plaintiffs has been made in this litigation.

18. Plaintiff's counsel also urges that costs should be borne by the defendants because of defendants alleged desire to have this action maintained as a class action as evidenced by defendants having moved for consolidation of the three actions. This is truly a very high price to ask defendants to pay for seeking modest relief from the harassment to which defendants were subjected by reason of the three duplicatory actions instituted by plaintiffs. In fact, such consolidation benefited all parties and this Court through the avoidance of duplication of effort and expense.

Deferral of Notice

19. Counsel for plaintiffs suggests that decision as to the form of notice, the method of giving notice and as to who shall bear the costs of notice are all matters which should be deferred until plaintiffs have had an opportunity

to move for summary judgment on the issue of liability. We do not oppose this suggestion although we anticipate that there probably will be disputes as to critical questions of fact which make it doubtful that liability can be determined by such a motion. However, as a result of such a motion we have no doubt that light will be shed on the nature of plaintiffs' claims and their lack of merit.

20. The ultimate questions are whether the restricted securities were carried by the Fund at "fair value as determined in good faith by the board of directors" as required by §2(a)(41)(B)(ii) of Investment Company Act of 1940 and whether the Fund's disclosures relating to restricted securities, having due regard for the materiality thereof, complied with statutory requirements as they existed from time to time.

21. The facts will demonstrate that the defendants complied with the law on both issues. The prospectuses and periodic reports which plaintiffs claim were inadequate were filed with and reviewed by the Securities and Exchange Commission without any complaint from it regarding inadequate disclosure—a factor which is of considerable significance in view of the Commission's extensive jurisdiction over the administration of the securities laws.

22. We have no doubt that the undisputed facts will also demonstrate that the directors of the Fund were men of outstanding character and experience, who exercised sound business judgment in connection with the affairs of the Fund and that they fully complied with the applicable statutory and industry standards in valuing the restricted securities here involved and in making disclosure concerning them. During the time in question the highly qualified

Board of Directors of the Fund included among others, the following:

- Congressman Emanuel Celler;
- Murray Graham—formerly Senior Vice-President of R.H. Macy & Co.;
- Eric Hauser—private investor;
- Joseph M. McDaniel, Jr.—formerly Secretary of and now consultant to the Ford Foundation;
- Sidney M. Robbins—Professor of Finance, Graduate School of Business, Columbia University;
- Dean Mylosis—a general partner in City Associates;
- Edmund T. Delaney, Esq.—an attorney, formerly a partner in Townsend & Lewis, who had been counsel for the Fund;
- Leon Levy and Jack Nash, two senior partners of defendant Oppenheimer & Co. who were also senior officers of defendant Oppenheimer Management Corporation and who have had extensive experience in the securities industry.

23. If the Court determines that this consolidated action may be maintained as a class action on behalf of persons who purchased shares of the Fund, such class should be limited to those who purchased Fund shares during the period from March 28, 1968 to a date which is not later than April 25, 1969. It is respectfully submitted that in all of the circumstances here present, the Court should not require the defendants to pay the costs of notice to members of the class.

/s/ Leon H. Tykulsker
Leon H. Tykulsker

[Sworn to April 13, 1973]

Affidavit of Robert Galli Sworn to May 23, 1973

UNITED STATES DISTRICT COURT

Southern District of New York

[same title].

State of New York,
County of New York, *ss.*:

Robert G. Galli, being duly sworn, says:

1. I am Secretary of defendant Oppenheimer Fund, Inc. ("Fund"), and Administrative Vice President and Secretary of defendant Oppenheimer Management Corporation.

2. I make this affidavit in connection with plaintiffs' proposal that the notice to be sent to class members should be included in a regular mailing of the Fund to its shareholders. This proposal should be rejected by the Court because any such mailing will not reach a very substantial number of shareholder accounts who are members of the class specified by plaintiffs and at the same time such a mailing can be expected to have a serious adverse effect on the Fund and its current shareholders.

3. The basic facts are as set forth in the affidavit of Leon H. Tykulsker, sworn to April 13, 1973, and submitted in behalf of the Oppenheimer Defendants ("Tykulsker Affidavit"). As set forth in said affidavit, as of March 31, 1973 there were over 173,000 shareholder accounts holding Fund shares (Tykulsker Aff., Par. 4). From March 28, 1968—

April 24, 1970, the period specified by plaintiffs, there were approximately 121,000 shareholder accounts which purchased Fund shares (Tykulsker Aff., Par. 14). Even if all of these accounts remained to date, there would be at least 52,000 shareholder accounts which did not purchase shares during the relevant period and who are not members of the class specified by plaintiffs. In fact, however, the number of shareholder accounts which are not members of this class is substantially greater. Since April 24, 1970, the end of the period, approximately 68,491 new shareholder accounts have been opened. In addition to these new accounts, there are many shareholder accounts existing prior to March 28, 1968 which did not buy shares during the relevant period and which are still shareholder accounts at this time. Thus, a very substantial number of current shareholder accounts are not members of the class designated by the plaintiffs.

4. There is a constant turnover of shareholders of the Fund. Many accounts which acquired shares during the relevant period are no longer current accounts. Therefore, even if a notice were sent to all current accounts, it would not reach the members of the class who are no longer current. Since a separate mailing would be required to reach these class members, I urge that the mailing to all class members be made separately and not as part of a mailing to all current accounts because of the substantial injury to the Fund and its shareholders which can result from such a general mailing.

5. I do not believe it is necessary for me to dwell at length on the current loss of investor confidence in the stock market and the uncertain conditions under which that market exists at this time. Since 1970 the market trend has generally been down, and this has been especially true in the last four to five months. As a result, the mutual fund industry has in the last year or so been in a period where net redemptions have exceeded sales. This trend has also hit the Oppenheimer Fund, when for the first time in its history, during the three months period February-April 1973 redemptions exceeded sales, so that net worth was reduced by a little over 1% by reason of such redemptions.

6. Any event which raises questions in the investor's mind in this uncertain climate is likely to cause him to redeem his mutual fund shares. This has been the experience of the Fund and of the mutual fund industry as a whole. A broadcast mailing of a class action notice to all of the current shareholders of the Fund, even though a very large number of them have no direct interest in the suit, will undoubtedly cause shareholders to redeem their shares; and it is possible that such a notice may precipitate a substantial demand for redemption, which could well have some of the unfortunate effects of a run on a bank. In order to meet redemption calls, the Fund's liquid assets are consumed, thereby preventing the Fund from taking advantage of investment opportunities, and, in addition, the Fund will be required to make forced sales of securities in a very poor market—all to the detriment of the Fund and its shareholders.

7. In view of the possibilities of serious harm to the Fund and its shareholders, the large number of current shareholders who are not members of the class designated by plaintiffs and the fact that many members of the class are not current shareholders, the Court should not require

notice to the class to be mailed to all current shareholder accounts.

/s/ Robert G. Galli
Robert G. Galli

[Sworn to May 23, 1973]

Memorandum of Defendants Oppenheimer Management Corp., et al., in Connection With Plaintiffs' Request for Oral Deposition of Witnesses in Boston, Massachusetts

UNITED STATES DISTRICT COURT
Southern District of New York

[same title]

This memorandum is submitted on behalf of defendants Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash (the "Oppenheimer Defendants") in support of their application to require the pre-trial discovery of Investment Companies Services Corporation ("ICSC") to be conducted on written interrogatories unless the plaintiffs pay the expense, including reasonable attorneys' fees, of attendance of defendants' counsel in Boston, Massachusetts, the place where plaintiffs propose to take the depositions on oral examination of the ICSC witnesses.

Discovery of a limited nature was authorized by the Court at a hearing on May 23, 1973 in connection with the class action motion.

Reference is made to the letters dated June 6 and 14, 1973 from Wolf, Popper, Ross, Wolf & Jones, counsel for plaintiffs, to Hon. Thomas P. Griesa, ("Wolf letters") and the letters dated June 8 and 14, 1973 from Guggenheimer & Untermyer, counsel for the Oppenheimer Defendants, to Hon. Thomas P. Griesa, ("Guggenheimer letters") concerning the discovery desired by plaintiffs with respect to notice to class members. The Wolf letter of June 6 and the Guggenheimer letter of June 8 indicate that the matters to be covered are limited in number as follows:

Memorandum of Defendants Oppenheimer Management Corp., et al., in Connection With Plaintiffs' Request for Oral Deposition of Witnesses in Boston, Massachusetts

(1) the number of persons who purchased shares of Oppenheimer Fund, Inc. ("the Fund") during the period March 28, 1968 to April 24, 1970;

(2) whether said persons can be identified through reasonable effort;

(3) if so, the number of said persons who are presently shareholders of the Fund;

(4) the cost, if any, of giving individual notice to said persons who are still shareholders of the Fund if notice is sent to them by the Fund in one of its regular mailings which the Fund sends to its shareholders; and

(5) the cost of giving individual notice to members of the class who are not current shareholders of the Fund.

As noted in the Guggenheimer letter of June 8, the witnesses and records necessary to supply this information are located in Boston, Massachusetts.

The information sought by the plaintiffs' discovery is factual and statistical in nature. The witnesses are employees of ICSC who would have to compile the requested data. They are disinterested and not hostile; neither credibility, character nor demeanor is likely to be an issue; and, therefore, cross-examination would not be necessary. Moreover, to the extent that the witnesses require time to assemble and compile information and statistical data, it may be possible that the deposition procedure could not be completed in a single day of examination.

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Letter dated June 25, 1973 to Hon. Thomas P. Griesa from John F. Davidson

Townsend & Lewis

[Letterhead]

June 25, 1973

Hon. Thomas P. Griesa
United States District Judge
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: *Sanders* v. *Levy*
69 Civ. 1242

Dear Judge Griesa:

Reference is made to Memorandum of the Oppenheimer Defendants in connection with Plaintiffs' Request for Oral Deposition of Witnesses in Boston, Massachusetts. On behalf of the unaffiliated defendants Edmund T. Delaney and Emanuel Celler, we are writing this letter to advise you that we join in the statements set forth in that Memorandum and request that the court require this discovery to be conducted by written interrogatories and cross-interrogatories unless the plaintiffs pay, in the first instance and subject to ultimate taxation of costs, the expenses of attendance of an attorney for the unaffiliated defendants at the place where the deposition is to be taken,

Letter dated June 25, 1973 to Hon. Thomas P. Griesa from John F. Davidson

including a reasonable attorneys' fee to be fixed by the court.

Respectfully yours,

John F. Davidson

cc: Wolf Popper Ross Wolf
& Jones
Attorneys for Plaintiffs

Guggenheimer & Untermyer
Attorneys for Oppenheimer Defendants

Weisman Celler Spett Modlin
& Wertheimer
Attorneys for Oppenheimer Fund

Letter dated June 26, 1973 to Hon. Thomas P. Griesa from Gerald Gordon

Weisman, Celler, Spett, Modlin & Wertheimer

[Letterhead]

June 26, 1973

Hon. Thomas P. Griesa
United States District Judge
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: *Sanders* v. *Levy*
69 Civ. 1242

Dear Judge Griesa:

Reference is made to the Memorandum of the Oppenheimer Defendants in connection with Plaintiffs' Request for Oral Deposition of Witnesses in Boston, Massachusetts. On behalf of defendant Oppenheimer Fund, Inc., we are writing this letter to advise you that we, like counsel for the unaffiliated defendants, also join in the statements set forth in the Memorandum and request that the Court require this discovery to be conducted by written interrogatories and cross-interrogatories unless the plaintiffs pay, in the first instance and subject to ultimate taxation of costs, the expenses of attendance of an attorney for defendant Oppenheimer Fund, Inc., at the place where the deposition

Letter dated June 26, 1973 to Hon. Thomas P. Griesa from Gerald Gordon

is to be taken, including a reasonable attorneys' fee to be fixed by the Court.

Respectfully yours,

Gerald Gordon

GG:eca
by hand

cc: Wolf Popper Ross Wolf & Jones, Esqs.
Attorneys for Plaintiffs

Guggenheimer & Untermyer
Attorneys for Oppenheimer Defendants

Townsend & Lewis, Esqs.
Attorneys for unaffiliated Defendants

Plaintiffs' Memorandum in Reply to Defendants' Memorandum of June 25, 1973 Concerning Proposed Discovery in Boston

UNITED STATES DISTRICT COURT
Southern District of New York

[same title]

Preliminary Statement

Plaintiffs respectfully submit the following memorandum of law in reply to the memorandum served and filed by the defendants on June 25, 1973 in connection with the plaintiffs' proposed discovery of defendants' agents in Boston, Massachusetts. The proposed discovery is concerned with determining the appropriate method of giving notice to the class in this case and the cost of such notice. In a letter to the Court dated June 6, 1973, this firm indicated that discovery was sought with respect to the following matters:

(1) the number of persons who purchased shares of Oppenheimer Fund, Inc. (the "Fund") during the period March 28, 1968 to April 24, 1970;

(2) whether said persons can be identified through reasonable effort;

(3) if so, the number of said persons who are presently shareholders of the Fund; and

(4) the cost, if any, of giving individual notice to said persons who are still shareholders of the Fund if notice is sent to them by the Fund in one of its regular mailings which the Fund sends to its shareholders.

In a responding letter dated June 8, 1973, counsel for the defendants indicated that they did not object to the above outlined scope of examination "other than to note that it should be amplified to cover also the cost of giving individual notice to members of the class who are not current stockholders." Defendants' counsel also indicated at that time that the information could be obtained only by questioning employees of the Investment Companies Services Corporation (ICSC), whose offices are located in Boston, Massachusetts because the information and underlying records are available only at the ICSC's offices. In addition, defendants' counsel requested that the Court impose upon plaintiffs the obligation to advance the expenses of defendants' counsel for attending an oral deposition in Boston or the travelling expenses of the witnesses if the examination is to be conducted in New York and in the alternative suggested that the examination be conducted upon written interrogatories pursuant to Rule 31. In a responding letter dated June 14, 1973, plaintiffs' counsel indicated to the Court that it appeared that the examination could be most expeditiously and effectively conducted in Boston, that an oral examination would be the most efficient manner of accomplishing this discovery, and that the defendants' counsel had not shown any special circumstances or good cause which could justify an order requiring plaintiffs to advance their expenses. Defendants' brief dated June 25, 1973 appears to be in the nature of an application for a protective order granting such relief, although no motion to that effect has been filed pursuant to Rule 26 (c). In response, plaintiffs' respectfully request the Court to consider the following points.

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In the instant case, although the scope of this particular discovery is limited to the question of notice, and the witnesses, as defendants suggest, may be disinterested, that does not solve the problem. Indeed, the Court itself has expressed some doubt as to why it should be difficult or costly to determine the names and addresses of members of the class. (See transcript of 5/23/73 at 18-20.) Plaintiffs also fail to perceive the problem as to why it should be difficult for the defendants to fully identify the members of the class and to notify them by enclosing a notice with one of the Fund's regular mailings to its stockholders. Plaintiffs believe that the facts relating to this matter can be obtained most efficiently and expeditiously by means of a deposition upon oral examination. The proposed discovery will go into the procedures available for ascertaining the names and addresses of the members of the class and for sending out notice to those persons in one of the Fund's regular mailings including the use of computers in connection therewith and consequently it may necessitate a fairly precises series of questions to fully ascertain the pertinent facts. In a situation like this, it is often difficult to frame in advance exactly those questions which are needed to elicit completely the necessary information, and to require the plaintiffs' examination to be conducted by means of written interrogatories, cross interrogatories and supplemental interrogatories would be unduly time consuming and inefficient.

• • • • •

Affidavit of Donald Ruby Sworn to December 12, 1973

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

Donald N. Ruby, being duly sworn deposes and says:

1. I am a member of the firm of Wolf Popper Ross Wolf & Jones, general counsel for the plaintiffs in this consolidated action. This affidavit is submitted in support of the plaintiffs' motion for an Order pursuant to Rule 23(c)(1) of the FRCP declaring that this consolidated action may be maintained as a class suit and is directed, in particular, to the delineation of the class and the method and form of giving notice to members of the class.

2. Plaintiffs have moved to have this consolidated action maintained as a class suit on behalf of persons who purchased shares of Oppenheimer Fund ("Fund") during the period March 28, 1968 to April 24, 1970. Plaintiffs wish to modify their application relating to the description of the class and request that the consolidated action be maintained as a class suit on behalf of persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 *and* who, like the plaintiffs, are still stockholders of the Fund (or more precisely who are still stockholders on a specified date prior to sending out the Notice (the "record date")).* This modification in the

scope of the class will help simplify the issues in the case and will obviate the need for further discovery, it will help to reduce the cost of giving notice to the members of the class so that the action can proceed as a class suit, and it will facilitate the distribution of a recovery to the members of the class if liability is established, or if the action is otherwise settled by the parties.

3. First of all, the elimination of persons from the class who, unlike the plaintiffs, are no longer shareholders of the Fund will help to eliminate the issues raised by the defenses set forth in defendants' amended answers to the effect that the defendants are entitled to a set-off against those persons who purchased shares during the period March 28, 1968 to April 24, 1970 and thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the portfolio of the Fund and will obviate the need for plaintiffs to conduct any discovery relating to said defenses as allowed by the Court in connection with the granting of defendants' motions for leave to serve amended answers. Secondly, if the description of the class is not modified so as to eliminate those persons who are no longer shareholders of the Fund, the cost of giving notice to the class (which would then be in excess of $20,000) would far exceed the amount that plaintiffs are in a position to afford and thus plaintiffs would be unable to continue prosecution of this consolidated action as a class suit to vindicate the rights of all those members of the class who purchased shares during the period March 28, 1968 to April 24, 1970 and are still shareholders of the Fund. As indicated in our accompanying supplemental memorandum of law, the plaintiffs should be given wide latitude in describing the

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* This date would be the same record date as used by the Fund for determining its current shareholders for purposes of sending out its regular mailing which could also include the Notice to members of the class in this case.

class, the class should be described so as to facilitate the maintenance of a class action and the interests of the members of the class whom plaintiffs seek to represent (in this case persons who purchased shares during the aforementioned period and are still shareholders of the Fund) certainly should not suffer simply because the class might be described in broader terms. Finally, the elimination of persons who are no longer shareholders of the Fund will facilitate the distribution of any recovery which is obtained in this action and thus aid in the management of the action since it will be a simple thing for the Fund to distribute any recovery to the members of the class who are shareholders of the Fund.

4. With respect to the question of notice, Rule 23(c)(2) provides that:

> "the Court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort"

As indicated in our supplemental memorandum of law, the language of Rule 23(c)(2) means that the Court shall cause notice to be given as it shall direct. Under the provisions of said Rule, the Court has certain discretion in determining how notice should be given so long as the provisions of the Rule and the requirements of due process are satisfied. In making this determination, the Court should be guided by the principle that Rule 23 should be liberally construed with the view to enhancing the use of class actions as a means of vindicating the rights of persons who, as in the instant case, have been damaged as a result of alleged violations of the federal securities laws.

5. With the foregoing in mind, plaintiffs respectfully request that the Court direct that notice be sent to the members of the class in the following manner: A Notice in appropriate form directed to persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 and who are still shareholders of the Fund should be prepared at plaintiffs' expense and should then be inserted in a regular mailing which is sent by the Fund to all of its current stockholders (approximately 171,000) of which defendants' estimate approximately 100,000 would be members of the class. Since actual individual notice will be sent by mail to all members of the class, this method of giving notice will clearly satisfy the provisions of Rule 23 and the requirements of due process. As indicated in our supplemental memorandum of law, the Notice provisions in Rule 23 are designed to satisfy the requirements of due process and the requirements of due process are satisfied when, as in the instant case, the Notice which is sent to the members of the class is "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action". The fact that the plaintiffs cannot state the exact number of people in the class or identify them by name at this time, does not, as shown in our supplemental memorandum of law, preclude the maintenance of a class action and is irrelevant for purposes of determining whether the notice provisions of Rule 23 and the requirements of due process have been satisfied.* What is important is that actual individual notice by mail will be sent to all members of

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* If plaintiffs are subsequently successful in establishing liability and there is a recovery in the action, the names and addresses of the class can be then ascertained so that a recovery can be sent to them.

the class apprising them of the pendency of the action and of their right to request exclusion pursuant to the provisions of Rule 23. Moreover, since the class has been defined with precision (all persons who purchased shares of the Fund between March 28, 1968 and April 24, 1970 and were still shareholders of the Fund as of the record date) there will be no problem in entering a judgment in this action, whether favorable or not to the class, pursuant to Rule 23(c)(3) describing the persons who are bound by the judgment.

6. The insertion of the Notice in a regular mailing by the Fund to its shareholders will avoid unnecessary postage charges and will thus reduce the costs of giving notice to the class. As indicated in our supplemental memorandum of law, this procedure has been favorably referred to by the Courts. Plaintiffs will pay for the cost of inserting the Notice into one of the regular mailings by the Fund. We have been advised by the Transfer Agent of the Fund that there is a charge of $.01 per insert. We estimate that the cost of preparing an appropriate notice directed to the members of the class and having it inserted into a regular mailing by the Fund to all of its current shareholders will cost approximately $5,000. Plaintiffs are prepared to pay these expenses.

7. While the Court of Appeals for the Second Circuit in the *Eisen* case indicated that the plaintiffs should normally pay the costs of notice, there is no reason why the costs of notice should not be minimized so as to enable the plaintiffs to meet this burden and thus facilitate the maintenance of a class action. Plaintiffs herein are not seeking by virtue of the procedure proposed by us to depart from the rules set forth in *Eisen,* (though we note, of course, that the rules laid down in *Eisen* relating to notice may be liberalized as a result of the Supreme Court's review of the case) but rather are requesting the Court to direct that notice be given in a manner consistent with the provisions of Rule 23 and the requirements of due process, which they will be able to afford. To the extent that it is feasible and consistent with the provisions of the Rule and due process, we submit that the Court should exercise its discretion to minimize the costs of Notice so as to facilitate the maintenance of this consolidated action as a class suit.

8. The defendants have suggested in prior affidavits submitted to this Court that notice should not be sent out in the manner proposed by plaintiffs since it would be received by some present stockholders of the Fund who were not members of the class and that this would have an alleged adverse effect on the Fund and its current shareholders. We fail to understand the defendants' contention since the Fund has since 1970 apprised its shareholders of the pendency of this action in its proxies, prospectuses, and annual reports, no less than thirteen times. We have annexed hereto and marked "Exhibit A" a copy of pages 23 and 24 of the Fund's prospectus of April 30, 1973 which was forwarded to shareholders of the Fund and was filed with the Securities and Exchange Commission which contain a description of the claims alleged in the instant case as well as a statement that "in the opinion of counsel to the Fund and that of counsel for the Management Corporation, these suits have no legal merit". The statements contained in the prospectus of April 30, 1973 relating to the instant case are essentially the same as the statements

contained in prior prospectuses, proxies and annual reports of the Fund. Thus, the stockholders of the Fund have been repeatedly apprised of the pendency and nature of this litigation and have been advised by the Fund that in the opinion of their counsel and counsel for the Management Corporation, the suits have "no legal merit". Accordingly, it is difficult to understand defendants' contention that informing the stockholders of the Fund for perhaps the fourteenth time of the pendency of this litigation would result in any adverse effect upon the Fund and its current shareholders. A similar claim by defendants in another class action, which is referred to in our supplemental memorandum of law was specifically rejected by the Court, which noted that the defendants had already apprised its stockholders of the litigation.

9. We respectfully suggest that the defendants' claims of alleged harm are essentially frivolous and are, in fact, motivated by an understandable desire to maximize the costs of giving Notice in this case so as to prevent the action from proceeding as a class suit. If it were necessary to ascertain the names and addresses of the members of the class at this time, so that notice could be sent only to them and to none of the other shareholders of the Fund, it would be necessary for the Transfer Agent of the Fund to obtain this information by going through a process involving the use and programming of computers, which we are advised would cost approximately $16,000. Thus, the total cost of giving notice to the class if it were necessary to ascertain the names and addresses of the members of the class at this time and to send the notices solely to these individuals would be in excess of $20,000. Since plaintiffs are not in a position to agree to pay the costs of notice in this amount, the defendants would be successful in preventing this action from proceeding as a class suit and would for all intents and purposes have avoided liability to the members of the class without having to risk a determination on the merits. We respectfully submit that the Court should not sanction the defendants' efforts to maximize the cost of notice in order to prevent this action from continuing as a class suit and that the Court should direct that notice be given in the manner proposed by the plaintiffs since this procedure will comply with the provisions of Rule 23 and will meet the requirements of due process while keeping the costs of Notice in an amount which the plaintiffs can afford so that the action can proceed as a class suit.

10. Finally, with respect to the question of whether the Notice that is sent to the members of the class should contain some kind of "opt-in" provision, we respectfully submit that the authorities cited in our supplemental memorandum of law clearly indicate that it would not be proper under Rule 23 to require an affirmative response to this Notice from the class members in order to be included in the class or to be entitled to assert a claim in this action if liability is subsequently established. As indicated in our supplemental memorandum of law, the use of a so-called "opt-in" provision in connection with this Notice has been clearly rejected by the courts in this Circuit.

/s/ DONALD N. RUBY
Donald N. Ruby

[Sworn to December 12, 1973]

Affidavit of Donald Ruby Sworn to July 17, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

DONALD N. RUBY, being duly sworn, deposes and says:

1. I am a member of the firm of Wolf Popper Ross Wolf & Jones and I respectfully submit this affidavit in response to the Court's request for further information in connection with the method by which plaintiffs estimated the damages suffered by the class.

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5. Based upon the foregoing, and upon the reasons set forth in our accompanying memorandum and the prior memoranda submitted in support of the instant motion, it is respectfully requested that the instant motion for class action determination be granted, that the action be declared a class action on behalf of all persons who purchased shares of the Fund between March 28, 1968 and April 24, 1970, that notice be directed to all members of the class in the manner previously proposed by plaintiffs, and that any additional expense which is necessary to restrict the distribution of the class action notice to only those shareholders who comprise the class be borne by the defendants.

/s/ DONALD N. RUBY
Donald N. Ruby

[Sworn to July 17, 1974]

Notice of Motion for Reargument of Defendants Oppenheimer Management Corp., et al., dated June 9, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the Accompanying Memorandum of Law and upon the papers filed with respect to the class action motion, defendants Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash (the "Oppenheimer Defendants"), by their attorneys, will move this Court, at the Chambers of Judge Thomas P. Griesa, in Room 607-H, United States Courthouse, Foley Square, New York, N.Y. on the 23rd day of June, 1975, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 9(m) of the General Rules of the Southern District of New York to reargue the class action motion, and for such other and further relief as may be just.

Dated: New York, New York
June 9, 1975.

Guggenheimer & Untermyer
By: Leon H. Tykulsker
Leon H. Tykulsker.
Attorneys for
Oppenheimer Defendants
80 Pine Street
New York, New York 10005
(212) 344-2040

To:

Wolf Popper Ross Wolf & Jones
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

Weisman, Celler, Spett, Modlin & Wertheimer
Attorneys for Defendant
Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022

Thacher, Proffitt & Wood
Attorneys for Defendants
Edmund T. Delaney and Emanuel Celler
40 Wall Street
New York, New York 10005

Notice of Motion for Reargument of Defendant Oppenheimer Fund, Inc., dated June 10, 1975

UNITED STATES DISTRICT COURT
Southern District of New York

[same title]

Sirs:

Please take notice that upon the accompanying memorandum, the opinion of this Court dated May 15, 1975 and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Chambers of Judge Thomas P. Griesa, Room 607-H in the United States Courthouse, Foley Square, New York, New York, on June 23, 1975 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, pursuant to Rule 9(m) of the General Rules for the Southern District of New York, for reargument of plaintiffs' motion pursuant to Rule 23 of the Federal Rules of Civil Procedures and for such other and further relief as may be just.

Dated: New York, New York
June 10, 1975.

Weisman, Celler, Spett, Modlin & Wertheimer
By Milton C. Weisman
A Member of the Firm
Attorneys for Defendant
Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022

Notice of Motion for Reargument of Defendant Oppenheimer Fund, Inc., dated June 10, 1975

To:

Wolf Popper Ross Wolf & Jones
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

Guggenheimer & Untermyer
Attorneys for Oppenheimer Defendants
80 Pine Street
New York, New York 10005

Thacher, Proffitt & Wood
Attorneys for Defendants
Edmund T. Delaney and Emanuel Celler
40 Wall Street
New York, New York 10005

Notice of Motion for Reargument of Defendants Edmund T. Delaney and Emanuel Celler dated June 10, 1975

UNITED STATES DISTRICT COURT
Southern District of New York

[same title]

Sirs:

Please Take Notice that upon the accompanying Memorandum of Law and upon the papers heretofore filed with respect to the class action motion, defendants Edmund T. Delaney and Emanuel Celler (the "Unaffiliated Defendants"), by their attorneys, Thacher, Proffitt & Wood, will move this Court, at the Chambers of Judge Thomas P. Griesa, in Room 607-H, United States Courthouse, Foley Square, New York, N.Y. on the 23rd day of June, 1975, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 9(m) of the General Rules of the Southern District of New York, to reargue the class action motion, and for such other and further relief as may be just.

Dated: New York, New York
June 10, 1975

Thacher, Proffitt & Wood
By Dwight B. Demeritt, Jr.
Attorneys for Unaffiliated Defendant
40 Wall Street
New York, New York 10005
(212) 483-5800

Notice of Motion for Reargument of Defendants Edmund T. Delaney and Emanuel Celler dated June 10, 1975

To:

WOLF POPPER ROSS WOLF & JONES
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
Attorneys for Defendant Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022

GUGGENHEIMER & UNTERMYER
Attorneys for Oppenheimer Defendants
80 Pine Street
New York, New York 10005

Plaintiffs' Notice of Motion for Reargument dated June 10, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

PLEASE TAKE NOTICE, that upon the accompanying Memorandum, and upon the plaintiffs' motion for a class action determination pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, and all of the affidavits, memoranda and other papers submitted in connection therewith, and upon the opinion of the Court filed May 15, 1975 determining that the above consolidated actions may be maintained as a class action and upon all prior proceedings herein, the undersigned will move this Court in Court Room 607-H of the United States Court House, Foley Square, New York, New York, on the 23rd day of June, 1975, at 10:00 A.M. or as soon thereafter as counsel can be heard for an Order permitting reargument with respect to the question of the method of giving notice to the members of the class who are still shareholders of Oppenheimer Fund (the "Fund"), and upon reargument, directing that notice be sent to said members of the class by enclosing an appropriate notice in a regular mailing by the Fund to said class members (but not to other shareholders of the Fund who are not members of the class) with plaintiffs to pay for the additional expense involved in mailing the notice to said class members as part of the regular mailing, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
June 10, 1975

Yours, etc.

Wolf Popper Ross Wolf & Jones
By **Donald N. Ruby**
A Member of the Firm
General Counsel for Plaintiffs
845 Third Avenue
New York, New York 10022
(212) PL 9-4600

To:

Guggenheimer & Untermyer
Attorneys for Oppenheimer Management Corporation, Oppenheimer & Company, Leon Levy and Jack Nash
80 Pine Street
New York, New York 10005

Weisman Celler Spett Modlin & Wertheim
Attorneys for Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022

Notice of Appeal of Defendants Oppenheimer Management Corp., et al., dated October 27, 1975

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

Notice is hereby given that defendants Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash (the "Oppenheimer Defendants") hereby appeal to the United States Court of Appeals for the Second Circuit, from the order of Judge Thomas J. Griesa, dated September 30, 1975, and entered in this action on October 1, 1975, insofar as it denied the Oppenheimer Defendants' motion for reargument of the decision of the Court filed May 15, 1975.

Dated: New York, N.Y.
October 27, 1975.

Guggenheimer & Untermyer
By: /s/ **Leon H. Tykulsker**
Leon H. Tykulsker
Attorneys for Defendants Oppenheimer Management Corporation, Oppenheimer & Co., Leon Levy and Jack Nash
80 Pine Street
New York, N.Y. 10005
Tel. (212) 344-2040

Notice of Appeal of Defendants Edmund T. Delaney and Emanuel Celler dated October 27, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that defendants Edmund T. Delaney and Emanuel Celler (the "Unaffiliated Defendants") hereby appeal to the United States Court of Appeals for the Second Circuit from the order of Honorable Thomas P. Griesa, U.S.D.J., dated September 30, 1975, denying their motion for reargument of his opinion dated May 15, 1975 granting plaintiffs' class action motion, entered in this action on the 1st day of October, 1975.

Dated: October 27, 1975.

THACHER, PROFFITT & WOOD
By /s/ ROBERT S. STITT
Attorneys for Defendants Edmund T. Delaney and Emanuel Celler (the "Unaffiliated Defendants")
40 Wall Street
New York, New York 10005
(212) 483-5800

To:

WOLF POPPER ROSS WOLF & JONES
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

Notice of Appeal of Defendant Oppenheimer Fund, Inc. dated October 30, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

NOTICE is hereby given that defendant OPPENHEIMER FUND, INC., hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Judge Thomas P. Griesa entered in this action on the 1st day of October, 1975.

Dated: New York, New York
October 30, 1975

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
By /s/ MILTON C. WEISMAN
A Member of the Firm
Attorneys for Defendant Oppenheimer Fund, Inc.
425 Park Avenue
New York, New York 10022
Tel. No.: (212) 371-5400

Notice of Appeal of Defendant Oppenheimer Fund, Inc. dated October 30, 1975

To:

Wolf Popper Ross Wolf & Jones
Attorneys for Plaintiffs
845 Third Avenue
New York, New York 10022

Guggenheimer & Untermyer
Attorneys for Oppenheimer Defendants
80 Pine Street
New York, New York 10002

Thacher Proffitt & Wood
Attorneys for Defendants
Edmund T. Delaney and Emanuel Celler
40 Wall Street
New York, New York 10005

Deposition of Investment Company Services Corporation (by John C. J. Wouters and Frank Sebastian) and Additional Information Supplementing the Same dated July 18, 1973 and October 10, 1973, Respectively*

UNITED STATES DISTRICT COURT

Southern District of New York

[same title]

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(1)

Depositions of Investment Company Services Corporation (by John C. J. Wouters and Frank Sebastian) held pursuant to the Federal Rules of Civil Procedure, before Thomas P. Foley, C.S.R., at the office of Investment Company Services Corporation, 99 High Street, Boston, Massachusetts, on July 18, 1973, commencing at 11:00 a.m.

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(3)

John C. J. Wouters

being called as a witness, having been first duly sworn by the Notary Public, Lawrence S. Geisler, testified as follows:

Direct Examination by Mr. Ruby:

Q. How do you spell your name, sir? A. (Spelling) Wouters.

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* The deposition of the Fund's transfer agent, Investment Company Services Corporation, by Messrs. Wouters and Sebastian, its Comptroller and Director of Systems and Programming, respectively, was taken by plaintiffs' counsel on July 18, 1973; additional information, which was requested by plaintiffs' counsel during the course of the deposition, was forwarded by the transfer agent on October 10, 1973.

Q. Mr. Wouters, could you tell me by whom you are employed? A. By ICSC, Investment Companies Service Corporation.

Q. And what is your position with that company? A. I am the comptroller.

Q. A what? A. Comptroller.

Q. And how long have you held that position? A. About three years, slightly over three years.

Q. And what did you do before that? A. Before that I work for IT&T.

Q. What is that? A. International Telephone and Telegraph Corporation.

Q. And what did you do there? A. I designed a system for their mutual funds.

(4)

Q. A system? A. A system, a shareholder accounting system.

Q. Does that involve the use of computers? A. Yes, it did.

Q. Are you trained in the use of computers? A. I have a certificate from New York University in data processing which involved training in programming and related subjects.

Q. And as comptroller of ICSC, what are your responsibilities? A. My responsibilities are the control of the data processing and in general within ICSC, for the clients of ICSC I make sure, for instance, that the shareholder accounting figures are in agreement with the funds' figures, that the bank accounts are kept up to date, reconciled. In other words, I take care of the financial obligations more or less.

Q. What is ICSC? What generally is their business? A. ICSC is a servicing company mainly for mutual funds. We service the shareholder updating for the mutual funds.

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(5) • • •

Q. And you say you do it for three Oppenheimer Funds. What are they? A. Oppenheimer Fund, Oppenheimer TIME Fund and Oppenheimer AIM Fund.

Q. To your knowledge, what is the Oppenheimer Systematic Capital Accumulation Program and what relationship, if any, does your company have with that? A. All right. Oppenheimer Systematic Accumulation Programs is a separate entity, to the best of my knowledge, that is investing in shares of (6) Oppenheimer Fund. As such, we have a control account within the Oppenheimer Fund records reflecting all the shares outstanding for the Oppenheimer Systematic Accumulation Program shareholders or plan holders, I should say.

Q. Would it be fair to say that people who purchase some interest in—I will call this OSCAP as an abbreviation—that they purchase an interest in some kind of plan which represents an undivided interest in Oppenheimer Fund shares? Is that your understanding? A. That would be my understanding, yes.

Q. And when these plans or accounts of a particular individual are liquidated, then the custodian of OSCAP sells the fund shares to the funds and the proceeds are then credited to the OSCAP holder, the plan holder? A. That is correct.

Q. And you keep various records for various OSCAP plan holders? A. That is correct.

Q. And the same way that you would keep records of the Oppenheimer Fund shareholders?

(7)

A. That is correct, in the same general way, not exactly the same way. The technical record keeping is different for the Oppenheimer Fund as opposed to the OSCAP plans.

Q. Does ICSC send out various reports for Oppenheimer Funds? A. Yes.

• • • • •

(8) • • •

Q. Do you have people who work with you and assist you as the comptroller here? A. Yes.

Q. Could you describe essentially the type of personnel who assist you in what you do? A. There is one assistant comptroller and three main divisions of the comptroller's division, three departments within the division. One department is mainly concerned with share reconciliation.

Q. What does that mean? A. That means that that particular department keeps track of share updating, share processing, share accounting, anything related to fund shares as being debit or credit to shareholders' accounts. There is another department that is called Cash Reconciliation Department, and that department (9) keeps track of the bank accounts that are being controlled by ICSC. The department receives the bank statements, pay checks, makes the reconciliations on a monthly basis, reports all the department's discrepancies, et cetera. There is a third department that does all kinds of individual jobs; for instance, the warehouse, the archives are under my supervision—forms ordering, forms control, abandoned property, research jobs, special research jobs that are kind of complicated, cost accounting, things like that.

Q. In connection with the various functions that you described, is much of this done through the use of computers? A. Yes.

Q. I would like you first to describe for me the procedure that you go through if you are sending out a report, like an annual report, like a letter from the president to the shareholders of Oppenheimer Fund, including the plan holders of OSCAP. A. Well, I could give you a general description of (10) the procedures followed, not exactly in detail, because I am not in charge of operations. So, you know, I may miss a couple of fine points mainly, but basically we have a file of magnetic tape for Oppenheimer Fund shareholders, we have a file of magnetic tape for OSCAP plan holders. This file contains the account numbers, balances, pertinent information as to the type of plans, number of payments made, all kinds of coding indicating foreign accounts, domestic accounts, estate coding, beneficiary coding, all kinds of information pertaining to the type of account that we are dealing with. We have a separate file with names and addresses pertaining to the shareholders. The two files are cross-referenced by way of account numbers.

Q. By way of account numbers? A. Account numbers. We send out the mailing, the procedure would be to access the names and addresses from a name and address file, merge them with the current open accounts on the shareholder's file, create a print tape, which is a magnetic tape again which is being used by (11) the computer to print out address labels or address insert slips which then would be inserted in a window envelope together with other material that would be mailed out in that particular mailing.

Q. Now let me go back for a moment to the magnetic tape that has certain pertinent information. I take it that this tape is constantly being changed? A. Yes, it is.

Q. As someone purchases Oppenheimer Fund shares, his account number and pertinent information are added? A. Yes.

Q. They are added to that, and at the same time there would be an addition to the other tape which contains the names and addresses with the cross index of the account number, right? A. That's correct.

Q. Would these tapes indicate when a purchase was made? Would it indicate the date that a purchase was made? A. Yes, it would.

(12)

Q. Would it indicate the number of shares purchased on that date? A. Yes, it would.

Q. Now let's assume that a particular shareholder buys a certain number of shares on one date and then a couple of weeks later he buys some more shares. Would this tape reflect each of these transactions? A. To a certain maximum number of transactions.

Q. Well, what is that? A. Which is 16 transactions.

Q. What happens after that? A. After that, as soon as the 16th transaction is recorded, we transfer that information automatically over to what we call purged full-page tape. The classification "full-page" refers to the statement that is being sent which is now full-page because it has transactions on it. So through computer programming we transfer the 16 transactions on this purged tape and we leave on the current tape a notation "balance forward" with the balance, which is the end balance of the last 16 transactions.

(13)

Q. So it refers to this separately? A. So we have the history tape, so to speak.

Q. When someone sells some shares, I take it, or redeems some shares, that would be also reflected in the magnetic tape, right? A. Yes.

Q. Now, suppose he sells all of his shares; is that handled differently? Does his name continue to be carried in the magnetic tape or is he eliminated or what happens? A. Well, first of all, the account goes to a zero balance.

Q. Right. A. He is not automatically eliminated from the tape, but here we have to make a distinction between the OSCAP and the voluntary fund shareholders because the procedure has been different for the two files. The OSCAP shareholders are still on the current tapes as far as the names and addresses are concerned.

Q. On OSCAP? A. The OSCAP shareholders—we still have the names and addresses of the OSCAP shareholders that in (14) the last number of years redeemed all their shares.

Q. Going how far back, for example? A. I wouldn't know.

Q. For example, would you have them going back to 1968? A. I would say yes.

Q. Now what about, insofar as they are concerned, whether they are redeemed, or do not redeem? They would still be on the tape? A. On the tape, right.

Q. What about the Oppenheimer Fund shareholders? A. Oppenheimer Fund we did take off all the closed accounts, off the magnetic tape as of the end of 1970, and we did it again as of the end of 1971.

Q. What does that mean, taking them off the tape? A. That means that every closed account is removed on that tape, that it doesn't exist there any more.

Q. It exists someplace? A. It exists still on what we call again a purged tape.

Q. So there is another tape?

(15)

A. Another tape.

Q. That still records the names, the account numbers, the addresses? A. The addresses.

Q. Of people who are no longer Oppenheimer Fund shareholders? A. That is correct.

Q. Approximately what is the present number of shareholders of Oppenheimer Fund?

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Mr. Ruby: Let's go back on the record. Mr. Galli, who is present in the room, indicated that he believes that approximately there are 175,000* combined shareholders of both the fund and OSCAP of which

about 90,000* are OSCAP and about 85,000* are Oppenheimer Fund, and I understand that more precise information can and will be obtained on this matter.

[See additional information, *infra.*]

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Q. Now let's say we were talking about a period from March 1968 to April 1970, we will talk about this a little more precisely, but I would like to ask you to describe for me the procedure that you would go through to determine the identity of people who purchased during that period? A. Okay. The procedure would be different for OSCAP as opposed to the voluntary fund because of the nature of the records that we keep for the two.

Q. All right, describe both of them then. A. Okay. For the voluntary fund, the most accurate, the best way of obtaining that information, would be to keypunch from the daily journals for that particular period of time the account numbers of all the accounts that made a purchase in that period.

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A. All right. On every day we have, every working day we have an update of shares bought, sold, transferred to and from shareholders of the funds. The result of that

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* Number of OSCAP plan holders	85,176
Number of Fund shareholders	86,019
	171,195

update is, among other things, a record which we call a daily journal containing all these transactions with totals.

Q. Now, the daily journal. What is that? Is that a collection of pieces of paper, is it a tape? What physically is it? A. It is a collection of pieces of paper that are produced by the computer that reflects all liquidations and other transactions and purchases on a given date for a given fund.

Q. How far back does that go? A. Well, we have checked and we have those available for the period of time that you just mentioned, March 29 to April 1970.

(19) • • •

Q. Now what did you say should be done with that? You said they keypunch it? A. Yes.

Q. What does that mean? A. Yes. For these—we can give these papers to a keypunch operator; she can keypunch an IBM card, and in that IBM card we can keypunch then the account number.

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Q. In other words, you would have one IBM card for each purchase made during that period. When you say "each purchase"— A. Yes.

Q. When you say "each purchase", do you mean that if a particular person made five purchases that there would be five IBM cards? A. Yes.

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Q. And, of course, some of them might be duplicative in the sense that the same person is making more than one purchase? A. That is correct, yes.

Q. So you would have a certain number of IBM cards that would reflect the purchases during this period. All right, now what would you do with those IBM cards? A. We would then take our current master file of the Oppenheimer Fund shareholders and we would then apply, after sorting, eliminating duplicates and selecting one record out of these cards, we would then apply that tape against the—or that number of cards against that particular current tape to select the shareholders names and addresses from the current tape for which we had a purchase.

Q. You said that you would take these cards and you would sort them. By "sort" what do you mean by that? A. We would sort the cards in account number order.

Q. In what?

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A. In account number order.

Q. Why would you do that? A. Well, it would be easier to handle them that way because our tape is in account number order any subsequent matching jobs or collating jobs or eliminating jobs would be easier if we put it in account number order.

Q. Is that chronological? A. Non-chronological.

Q. When you say "put them in order," what do you mean? A. Account number order.

Q. What does "account number order" mean? A. Well, account number one is lower than account number ten.

Q. In other words, going up from the lower numbers to the higher numbers? That is what you mean by sorting? A. Right. That's what I mean.

Q. Now, on those cards would that be something which is physically done? Would somebody be taking those cards and putting them in that order? How would that be done?
(23)
A. No. We would do that by machine.

Q. By machine? A. Yes.

Q. So the machine would put those cards in that order? A. Yes.

Q. Going from the lower numbers to the higher numbers? A. Yes.

Q. Is there anything else that is done with those cards before they are then compared with the master file tape? A. Well, we would then, if you want to go step by step through the thing—we could take the cards and put them on a magnetic tape.

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Q. All right, then what would you do? A. Then we would just, what we call, tape, sort, or just sort methods selected by computer programming, by application of computer programming select only one single record for each account number that we have, eliminating duplicates, in other words.

Q. All right. So where there were more than one purchased by a person, you would eliminate them? A. Would eliminate them.

Q. How would that be eliminated then, by machine? A. By machine.

Q. All right, then what would you do? A. That would give us one record for each shareholder involved in these purchases and we would still have that in the account number order.

Q. Right. A. So, therefore, we can then apply that particular record, that particular magnetic tape, against our current tape and match the account numbers on one tape against the other tape and, therefore, select then the names and addresses of (25) every account number that matches on—

Q. All right, now when you do this physically, you match one tape against the other, what would be the result of this? Is there some sort of printout? A. We would get a printout if we program it that way to get all the names and addresses of all the account numbers that are on file, we would call tape number one, which is the card tape, and also on the card tape. Now, we also find that some account numbers are on tape one but not on the current tape.

Q. And that is because they are no longer— A. They are no longer shareholders.

Q. No longer shareholders? A. Right.

Q. Is that true also of the fund shareholders which are in OSCAP? A. It is true that that particular situation exists, but on OSCAP we would not follow the same method.

Q. So what you have been describing so far deals with the fund shareholders? A. With the fund shareholders only.
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Q. All right, so that you would then, as a result of this, get a printout and you could get a printout which had the names and addresses? A. Names and addresses of the current shareholders.

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Q. I would like to go back over this again with this in mind: You mentioned a few things being done and now I would like you to tell me who would be doing these things, whether you have a reasonable estimate of the time that would be involved in doing it, what the particular person who is doing it, what the company pays for that person's time and so forth, so that I can get an understanding of what is involved in terms of the cost of going through the procedure that you just described. Okay? A. Okay.

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By Mr. Ruby:

Q. So you started off by talking about having somebody, a keypunch operator, taking the purchase list from the daily journal and making cards. Now what does that involve in terms of time and expense? A. We estimate the keypunching of that particular job which I described at about $6,000.

Q. Is that based upon an estimate of the number of transactions? A. Yes, it's very hard to estimate fairly accurate the number of transactions.

Q. Tell me how you arrived at that figure of $6,000. A. All right. We took the possibility that we would have about 300,000 cards, that we would be able to keypunch about 300 an hour, and that the cost of that would be $6 an hour, and that's how we got our estimate of $6,000.

Q. You say that you thought you could do 300 per hour. What is that estimated upon? A. Based on past experience within the company.

Q. That a keypunch operator could do 300 per hour?

A. Using the records that we provide, it all depends on what kind of records you provide a (28) keypunch operator; if there is a handwritten, manually written record, the keypunch operator would not be able to keypunch it as fast as from a machine-typed record.

Q. What are we talking about here? A. You are talking about machine-produced records.

Q. Machine-produced records? A. Yes.

Q. So these would be faster? A. But we are also talking about copies, not really copies—second or third, copies of the listing.

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Q. You say that is a third copy. What is the significance of there being a third copy? A. Well, it is a carbon copy so it is not as easy to read as the original one, so that may slow the keypunch operator down a little bit. That is what I am trying to say.

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Q. In the past when you say you have had some experience in doing this, in what context would somebody be doing this in the past? A. Well, we have used similar listings in the past to do certain research jobs. For instance, where we wanted to arrive at some statistical information to reconstruct activity within a certain period of time, we have used similar listings. For other firms' funds, for not exactly the same type of job that we are talking (32) about here, but the similarity is there, so we feel that on the basis of our experience with that type of work, we feel that a keypunch operator could do possibly about 300 cards an hour.

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Q. Let's go now to the question about the amount per hour. You talked about $6 per hour. What is that figure based upon? A. It is based upon our own cost studies, as to what the cost would be, as to what it would cost to have keypunch work done and it's comparable, (35) I would say, to outside charges by outside keypunch companies. * * *

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Q. Well, what factors go into that study? What do you consider in arriving at the $6 per hour? A. Salaries, fringe benefits and overhead, the rental (36) of the keypunch machine, for instance.

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Q. I would also like you to give me the range of salaries that you do pay these people who would be performing this.

[See additional information, *infra.*]

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Q. What about the rental of these keypunch machines? Are they rented? A. Yes.

Q. And what is the rental of a keypunch machine? A. Offhand I can't tell you that either, we have so many machines, we have listings available on these machines. I mean, all this information is available, but I don't have it off the top of my head.

Q. All right, I would appreciate it if you would also give me that. [See additional information, *infra.*] Now, you mentioned a time and cost study expense. Is this something that was embodied in some kind of memorandum? A. No, but our internal records are available in this company that would reflect certain cost studies that were made by my department to arrive (39) at the costs that are incurred within the company or within certain departments.

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Q. * * * All right, I would appreciate it if you could make a copy of that which reflects the computations that you have just described, which led to your opinion that (40) the cost to the company would be approximately $6 per hour. * * *

[See additional information, *infra.*]

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Q. You then apparently * * * (42) * * * also made an estimate of the number of cards. In other words, there were, I guess, three things that went into this equation: one was the estimate of the number of cards that could be produced per hour, one was the cost per hour and one was an estimated total number of cards. Now let's focus for a minute on the last item.

What, if anything, did you base that estimate on? A. The number of cards?

Q. Yes, total number of cards. A. Entirely upon word of mouth from our vice-president in charge of operations who feels that the number of transactions in that particular period of time would be around 300,000.

Q. And what period are you talking about now? A. About March 28, 1968 to April 24, 1970.

Q. He said there would be 300,000? A. That's his estimate.

Q. His estimate. And do you know what he based that on? A. I think he just based that on his feelings. I (43) don't think he has any records really available at this point, or I don't think anybody compiled any records to point out what the approximate number of transactions would be.

Q. I mean would you have any way of knowing where there are 200,000 as opposed to 300,000, or is there any basis, I mean? A. Well, again, we could do a study on it. We could take those daily journals that I was talking about and take a handful in the beginning of the period, the middle of the period, end of the period, and see how many transactions we have on there and then multiply that by the number of days involved and we could have a better estimate or a closer figure than we have right now. There's a lot of possibilities.

Q. Perhaps you might do that, if you can, to just try to get a slightly better estimate.

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Q. * * * I would like you to make an estimate for both the period from March 28, 1968 to April 25, 1969, you know, maybe taking three samplings or something like that— A. Yes.

Q. —and then also make the same estimate for the period April 25, 1969 to April 24, 1970.

[See additional information, *infra*.]

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Q. All right, now let's continue with your description of the procedure and the courses involved, now that we have covered the keypunching of this. Would you continue as to what is involved in terms of carrying this forward? A. Well, at the point where we have the keypunching all done, we can't really do anything with this work unless we create several programs, computer programs to handle this keypunch information, to transfer it on tape, to match tapes and to come up with the results that we are trying to come up with. So we made an estimate of the number of programs that we would have to create, we came up with eight programs that would have to be prepared, and our estimate for preparing that type of work would be about $7,500.

Q. Now, would you tell me what programs you are talking about? A. We are talking about what is generally known as computer programs.

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Q. Are there separate programs for both? A. Yes.

Q. Both separate? A. Yes.

Q. Let's take the fund ones for a moment. How many programs would be necessary to carry this forward as you have described it, dealing just for a moment with the fund? A. We have four programs that we would have to design to do the fund's work.

Q. And what do they consist of? A. It would be a program to capture the cards to tape, in other words, to transfer the information out of this card on to a magnetic tape.

Q. From the keypunch to a magnetic tape? A. Right.

Q. Right? A. There would be a program then to sort, eliminate and select one record out of that magnetic tape. (47)

Q. Yes? A. There would be a program then to match this particular end result of that tape to the current file of the fund shareholders.

Q. Yes? A. And there would be a program to match the unmatched accounts to our 1970 file for the voluntary shareholders in order to obtain all the addresses on the shareholders that are no longer shareholders at this point.

Q. In other words, three of them would deal with the ones who are presently shareholders, the fourth program would deal only with those who are no longer shareholders? A. That is correct.

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Q. * * * [A]s a result of these computer programs you would get, I take it, this carrythrough to the final printout, or is there anything else that had to be done? A. Well, no, because there's also some printing runs that will have to be done for which we think we have existing programming available, so we didn't have to make up a program, so these programs that I just mentioned, don't do the whole job.

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A. We have already some other programs available that we can apply to the rest of the job.

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Q. So this would carry us through then to the end of what you have described, so far dealing with the Oppenheimer Fund? A. Well, there is another point.

Q. As far as you know? A. Yes, there is another point on some other things that come into the work here. We need some project leader to coordinate all the efforts, to (50) schedule the work, to talk to Frank Sebastian and the EDP department to have these things done on time, so there is some supervisory cost involved, which we estimate at about $1,250, which would be a detail that I have around someplace, 50 hours at $25.

Q. On those 50 hours whom are you talking about there? A. Well, I am probably talking about somebody out of my division that we would assign the job of handling the whole project.

Q. Somebody who normally does what? A. Somebody who normally does accounting work or auditing work.

Q. Isn't there somebody who normally supervises the keypunch people? A. Yes.

Q. And when you are using the keypunch people and when you are preparing from the keypunch cards a tape and when you are having that done used in a program which has been devised, isn't there somebody who normally has responsibility for supervising these kinds of activities? (51)

A. We have supervisors in all our departments doing their own supervisory work, but if a special project like this which would come up which requires certain work to be done, that is not normally done in our company, then we would like to have somebody in charge of it so that we know with some certainty that the work is done properly.

Q. Well, I am trying to understand what, you know, additional time would be involved and I am a little confused as to the estimate that you have made about 50 hours. Maybe you can tell me what? A. Okay.

Q. Because it doesn't seem to me, from what we have described here, that we are talking about anything that would require any person beyond what he normally does in supervising people to spend 50 hours? A. Okay. I can take you through it and see if you agree with it. Somebody has to first design the system that we are going to follow. Somebody has to determine—

Q. What do you mean by "design the system"?

(52)

A. Well, somebody has to determine as to how exactly to get the information that we want to get.

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A. Also, once that system or that procedure has been set up, somebody will have to follow this procedure and make sure that all the various departments involved in processing this particular work are doing it exactly the way we want them to do it, that the results are coming out; that, for instance, we don't forget a whole week of journals. * * *

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Q. * * * Now, once that is done, what is it that this other person, the supervisor, is supposed to be doing at this time? A. Okay. The supervisor then has to coordinate the efforts between the keypunch department and the EDP.

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Q. What is the EDP? A. Electronic Data Processing Department.

Q. What does that mean, "coordinate"? What are you talking about? A. Coordinate the efforts. He's got to find the running time to run all these cards on the machine, get a listing to make sure that we have the same totals of the same total number of purchases that we have keypunched as we had available in the journal so we didn't miss any.

Q. What does that mean? What is he physically doing? When you say "coordinating", is he telling somebody to take these cards and to use them in making a tape? A. He will tell the supervisor in the keypunch department what exactly he wants done in the way of keypunching. He will tell the supervisor what kind of material in what form he wants out of keypunching.

Q. Yes. A. He will tell EDP what time to expect this particular work into the EDP department so that they can then schedule time available for running (55) these listings and running these totals. Then he has to coordinate and give instructions to his personnel again to check these totals back against the original documents.

Q. Yes, but aren't you talking though about a relatively short amount of time in terms of giving instructions? A. Well, I think it is not just giving instructions. It is also being on top of the work and checking it out and making sure that the work is being done on time, within the allotted time and properly.

Q. Yes, but while the work is going on, while the keypunch operators are working and after instructions have been given which presumably have been given in maybe a half hour or what have you, what is this person going to be doing? He is not going to be watching the people physically keypunching? A. No, he may not be watching.

Q. I mean isn't he going to be working on things he would be normally working on? A. Well, he may be all in all, but I think there's (56) already a lot of work involved in just getting the records out of our warehouse in the form ready for keypunching. Somebody has to go through these records and determine which listing belongs to the work we want to do and which not. Now I am saying you can go by the dates, you can go by the transaction codes, but it may not all be that simple. Suppose a little piece is torn off the side; you have no date; what are we going to do to establish what kind of date that should be there? All these types of decisions may come up and this supervisor will have to do something with it.

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A. Right. So far we have talked mainly about the voluntary funds. Keypunch, for instance, was all voluntary funds.

Now, once you have this keypunch, once you have this programming done, then you have to take a lot of machine time and operator time to get the results that you are trying to get. For instance, I haven't mentioned the paper cost or the cards, which is one $1.20 per thousand.

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A. $1.20 per thousand. I have not yet mentioned the fact that we would run approximately 15 hours at $150 computer time.

Q. The computer would run how long? A. 15 hours.

Q. 15 hours. A. At $150 an hour.

Q. And what is the estimate of 15 hours based upon? A. Again based on how much time it takes for us now to run through all the files that we currently carry on Oppenheimer Funds. In other words, we know that if we run a reel of tape on a machine and you take off certain information, it takes you about 15 minutes a reel.

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Q. Fifteen minutes a reel? A. A reel. We have looked at this particular work and estimated the number of reels that possibly could be involved, again based on an estimate of the number of cards, which again is an estimate of the number of transactions.

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Q. Fifteen hours total of computer time, and that is based upon the estimated number of cards which you gave before as 300,000, relating to the Oppenheimer Fund; is that correct? A. That is correct.

Q. And the 15 hours—is that again limited to Oppenheimer Funds? A. Yes.

Q. And this would be running the computer for what, to cover everything that you have described before? A. To capture to tape the cards that I described before, to sort these cards from tape at that point, to eliminate duplicate transactions from the same shareholder and to select one record per count and to arrive at a new tape which would give us all the transactions for all those shareholders that are involved for that particular period of time, so that at that point we have a tape with all the shareholders we want to have on there. It would also involve about 18 hours' operator time at $15 an hour. Now, the operator time is larger than the (63) computer time because this operator has to take tapes off, take them out of the vault, bring them back to the vault, put tapes on the machines, take tapes out of the machines. So while the computer isn't running, this operator is doing work for the particular job.

Q. The estimate or your reference to $15 [sic] an hour for the running of the computer, what is that based on? A. Again based on our own cost calculations that we have available within our own company.

Q. Do you have some document like the one that you have described? A. The same documents as we have described before.

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Q. Now, before we go over to complete the OSCAP aspect of it, is there anything else? A. No, there is more. We also feel that we have a sorting job alone on the cards before we can get them on tape, which would be about two hours, and just the cards we would use probably three machines for that, which brings it up to 6 hours. So we need another 6 hours of computer time for that particular job for $150 and nine and a half hours' operator time. So that the total processing time for all this, all this work that came out of this keypunching job, would be about

$4,000; and with the extra cost involved that I (65) just mentioned here, altogether we estimated on about $6,000 for the whole voluntary preparation.

Q. Well, now let's go back for a moment. I thought you testified before that in connection with the machine time for the computer, the 15 hours, that that would cover the sorting of the cards which would be done by machine? A. To capture to tape, the sorting, yes, but before we want to sort the cards, presort the cards, before we put them on tape, in other words.

Q. Isn't that done by machine? A. That is also done by machine, yes.

Q. Isn't that included in the 15 hours? A. Not the 15 hours. The 15 hours is the sorting after they are on tape.

Q. The sorting after? A. Yes.

Q. What sorting? A. There is a separate sort which you can do easier with less time before you put the cards on tape than when you do after the cards are on tape. In other words, sorting of cards is being done in (66) a different method than the sorting information that's already on tape, and we feel that with that number of cards that we would be better off to just put them in numerical order on a card sorter before they go on tape than doing it on a tape sorter. It would probably cost more money than if you did it on tape.

Q. On tape, but the computer time of 15 hours would not include what you would say is necessary in terms of sorting the cards? A. Before the capture of the cards, yes.

Q. And that you estimate to be two hours? A. Well, two hours with three machines, six hours in total, $150, that would be $900, and—

Q. Is there any basis for making that estimate? A. Again, the $150 is a flat rate.

Q. What do you mean by a flat rate? A. This is what we applied to this particular job. This is an average of what computer components cost.

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Q. * * * Now is there anything else on the processing and the cost? A. For the voluntaries?

Q. Yes. A. No, that would be it except, again, we have talked only about the preparation of certain tapes or listings or inserts that we are coming up with. The actual mailing has not been involved so far and we have no estimates on that, except we can tell you what we would charge for an envelope for an inserter, but depending on how many we need, that is what the cost is going to be; we we don't know how many.

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(Luncheon recess)

John C. J. Wouters, being recalled as a witness, having been previously duly sworn, resumed and testified further as follows:

(80)

Q. *By Mr. Ruby* Mr. Wouters, do you want to tell me the procedures that you haven't already covered which would relate to OSCAP? A. Okay. On OSCAP we follow different procedures to establish these files. We would take the current master tape of the OSCAP plan holders.

Q. The current what? A. Current master tape of the OSCAP plan holders, and this current tape still holds all the zero balance accounts. And we also have the names and addresses of zero balance accounts in OSCAP and we would then search that tape and extract out of that tape by programming all accounts opened in the period of March 28, 1968 to April 24, 1970. That would theoretically give us all the purchases that were made in that period of time.

Q. Now again are you talking about purchases, meaning all the individual purchases by each of the plan holders?
(81)
A. Individual.

Q. In other words, you would have more than one purchase perhaps for each plan holder, right? A. Yes, we would.

Q. Okay. A. To cover the dividend reinvestment which took place, which is for all practical purposes the same as a purchase, we would take a tape that is still available dated March 29, 1968, and that tape would give us the same shareholders as the ones that have received the dividend on June 21, 1968, if we eliminate out of that tape the accounts that closed in April, May, and June. Now, to extract out of the tapes the accounts that closed between April, May, and June is quite an extensive job and we would leave it up to your suggestion, whether you would want us to do that or not.

* * * * *

(82) * * *

Q. Right. What does this add to the other tape, in terms the people that would be covered? A. The shareholder or the plan holder that did not make a purchase.

Q. Yes? A. But was a shareholder, let's say, at the beginning of the period covered, would have received a dividend, the dividend was reinvested.

* * * * *

(83) * * *

By Mr. Ruby:

Q. Okay, now go ahead and tell me what else you would have to do in connection with the OSCAP? A. We would then merge the results of the first and the second tape to arrive at one total category that would be of shareholders that would be involved, and that would be the tape of the class of shareholders that we are looking for—as simple as that. Well, we then apply this particular tape against the current tape to get all the names and addresses as we did in voluntary. Once we have that, we have to apply a print program to print the notice.

* * * * *

(84) * * *

Q. Do you know what programming you are talking about in connection with— A. Again I need four programs. I need one program to access the current tape.

Q. To do what? A. To access the current tape, to go into the current tape and extract out of that current tape the account numbers of the accounts that were opened up within the period of the report. That is program number one.

* * * * *

A. Then I would have a program to take off tape those

(85) names that are included in the March 1968 tape. This is the second tape that I was talking about.

* * * * *

Q. So taking the people who invest the dividends, that is a second program? A. That's right.

Q. All right, what else? A. Then there would be a print program. First there would be a program to get to the names and addresses of the current tape and merge those with the account numbers and then there would be—

Q. Wait a minute, I am sorry. Would you say that again, please? A. There would be a program to extract the names and addresses.

Q. Yes? A. Of all the shareholders involved at that point (86) from the current tape.

Q. From the current tape? You mean matching it with the— A. The current master tape.

Q. With the first and second? A. Right.

Q. And this is the third thing? A. Right, and then there would be the tape to print address slips or address labels.

Q. Is that a program that—

* * * * *

A. Yes, it is. The printing of a particular document is a separate programming step. You cannot—

Q. But I mean as a result of the third, you would now have the names and addresses of all the (87) people in the class? A. Yes, you would.

Q. So all that would then remain—you mean to print those labels? That is what you are talking about? A. That is what I am talking about. Now, since there are two different tapes involved here at two different points in time, our system in the meantime has changed, so we are talking about two different systems and—

Q. What do you mean, two different tapes? A. Well, the first, the layout, the composition of the current tape, is different from the composition of the tape that was dated in 1968, so we cannot say—

Q. The composition of the current tape consists of everybody, right? A. Yes, but also the layout of the tape, the record, length and the spaces where these particular types of information are available are different.

Q. Yes? A. So we cannot apply one program to the same tape that we have now, so all that we had in 1968 that (88) we cannot readily merge the two, so we would wind up in the final end with two tapes instead of—two print tapes instead of one merged, combined tape.

Q. Two print tapes? A. Right.

Q. Well, I am not sure I follow you when you say two print tapes. You don't mean two printouts? A. Yes, two separate tapes which would have to—which we would have to supply a separate program to get them printed out because the information on these tapes is not in the same manner recorded.

* * * * *

Q. All right, now that you have that, what else is (89) left to do? A. Print the information on an address label.

* * * * *

Q. Is there anything else in connection with OSCAP? A. Well, the supervisory cost that I have explained before

is also a cost that was supposed to cover the whole operation, OSCAP as well as voluntary.

(91) * * *

Q. All right, anything else on OSCAP? A. No, that's it. Well, one in time—

Q. What is that? A. The actual machine time and operating time. We haven't touched upon that.

Q. What is that? A. Well, we expect that to be for question number one, which was to determine the class of shareholders. You would have about six and a half hours' computer time at $150.

Q. How did you estimate six and a half hours there? A. The same way we estimated the cost on the voluntary. It's an estimate based on our knowledge of similar, although not exactly the same, type jobs.

Q. Similar type jobs. As I recall, the last time you were doing it on the basis of the number of cards that you thought would have to be keypunched. Now here you don't have any cards keypunched? A. We have no cards.

Q. So now isn't there a different situation here? (92) A. Yes, but we also—I also said that we estimated computer time on the number of reels that we were going to run.

* * * * *

Q. The number of reels contained. What does that depend upon? A. On how much information there is available in total. If you have a lot of shareholders, you need more reels of tape to put them all on. If you have a little bit of information, you don't need that many reels.

* * * * *

Q. Do you know what the current number of reels are? A. The current number of reels in the current file (93) is, if I am not mistaken, three at the moment.

(95) * * *

* * * * * *

Q. * * * Do you rely upon in part the amount of time that it would take to run the master tape? A. In part.

Q. How long would it take to run the master tape? A. * * * It would take about three quarters of an hour machine time.

Q. What else is there which you rely upon in coming to the estimate that it would take six and a half hours? A. The possible number of passes that we have to make on these tapes. In fact, that we have a couple of old tapes from 1968, the condition of which we don't really know exactly until we are running them. We may have problems in reading those tapes, which could take more machine hours than the whole calculation that I have at the moment.

* * * * * *

(96) * * *

Q. I mean you have no information, do you, to indicate that there would be such problems? A. No but there is a possibility, and we also have to create new tapes, which is again a separate pass.

Q. You have to create a new tape? A. We extract.

Q. How many tapes would it take? A. We have to extract information out of the current tape. We extract information out of the old tape, we merge and we create a new tape every time we do that.

Q. How many tapes are you talking about?

* * * * * *

(97) * * *

A. I might have two new reels.

Q. Depending on how large it is? (98) A. Depending on how large it is.

* * * * * *

Q. And then you might have something on the dividend reinvestment right? A. Yes.

Q. So those are the reels that you are talking about, the things that flow from that, right? A. That's right.

Q. And then it is a question of running those reels and that it what determines the amount of time you are going to have to run your computer? A. Well, I also have to create new tapes from information that I extract out of the old ones which I have to run again.

Q. Isn't that what we are talking about? A. Yes, I hope so.

* * * * * *

(99) * * *

Q. All right, you told me what your estimate is. What else in terms of costs do you estimate? A. Well, we have not talked about testing time of these programs which takes up the machine time also, you know.

Q. What do you mean by testing time? A. Well, anytime you write a program, you just don't assume that a program is written and that it works exactly the way you want it to work, like the moment you put it on the machine, so you make a test.

* * * * * *

Q. Is that included in the six and a half hours? A. Yes.

* * * * *

(100) * * *

Q. What else? A. Operator time would be eight hours' time, slightly more than that because there are operators involved that would begin at $15 an hour.

Q. Yes. A. Now to get to the answer to question three, the number of members of the class who are presently shareholders of the firm, to get to that (101) information we estimate that we would not only need one hour running time at $150 an hour and a half operator time at $15—

* * * * *

Q. Are we finished? A. At this point we are finished, except we feel that the total cost of all this machine hours and all this preparation would be around $4,000.

Q. In other words, what you are doing now is giving me a total of what you gave me before? A. It's not a final but a total.

Q. And that $4,000 includes the machine time and what? A. It also includes the printing time.

* * * * *

(102) * * *

* * * * *

Q. What do you mean by printing? A. The printing of the address insert, the address slip, the label.

Q. The printing? A. Yes.

Q. Is that beyond what you have already described? A. That is the final end result of all the work that we are doing.

Q. Well, is that the printout the final part of your computer program? That is the final part of your computer

program, isn't it? A. Well, yes, it is. It is described as the final end result.

Q. You printout labels? A. It is the final printout tape from which we can printout the labels. The actual printing would be included in the $4,000.

Q. Now, is there anything else about the method of determining all of this that you have not covered? A. I don't think so.

(104) * * *

A. The maximum number of inserts we can have is four. Our machines don't allow us to put more.

Q. The maximum number of inserts? A. Is four.

Q. What do you mean by inserts? A. Inserts in an envelope.

* * * * *

(106) * * *

John C. J. Wouters, being recalled as a witness, having been previously duly sworn, resumed and testified further as follows:

By Mr. Ruby:

Q. Mr. Wouters, you heard Mr. Sebastian testifying and you heard my questions to him, and he described his knowledge of what the computer does. Now, I would like you just, (107) first of all, to tell me, so I have an understanding of how things are physically done, so let's just take the simplest thing of the mailing of, let's say, a quarterly report normally, without any additions. What happens, do you know? A. See, you are asking a question about what happens normally. I don't think there is any such thing as what happens normally. We never know what kind of extra inserts are required with a certain mailing.

• • • • •

(108) • • •

A. Okay. The computer room prepares the address slips in certain batches, depending on the category of mailing, on the instructions that they have gotten, as to what type of categories, what classes of shareholders are to be segregated from others. They identify these batches. They are going to the control group within the computer operations room, which consists of a couple of people that make sure that whatever the computer room delivers is in accordance with the instructions that they got, and then it goes to the mailroom.

• • • • •

(112) • • •

Q. How is it handled when, let's say, there are 175,000 envelopes that are going out and let's say that in a 100,000 envelopes there are two pieces and in 75,000 envelopes there are three pieces and, of course, the computer has indicated to you which of the envelopes the third piece should go in? How is that handled in terms of physically getting that into the envelopes? A. If that would be the only criteria, which is, you know, again a hypothetical because in practice that never happens, you would have only two separate parts or separate batches of mailing; one would be with two inserts and one would be with three inserts and there would be no differentiation as to postage or anything else. Under this hypothetical situation, you would have only two different batches that would come out of this machine into the mailroom and the mailroom would handle the first batch first and with a second batch second or vice versa.

Q. Would I be correct in saying that the cost would be negligible in terms of handling the mailing, (113) whether it be that all the envelopes were supposed to get two inserts or half of them or supposed to get three inserts? A. Well, we charge a penny per insert.

(154) • • •

Frank Sebastian, being called as a witness, having been first duly sworn by the Notary Public, Laurence S. Geisler, testified as follows:

Direct Examination by Mr. Ruby:

Q. Mr. Sebastian, by whom are you employed? A. ICSC.

Q. And what is your position? A. Director of Systems and Programming.

Q. How long have you been with this company? A. One year.

Q. And what did you do before that? A. I have been in data processing for about 14 years. The majority of my time was spent in management positions with IBM.

Q. And what are your responsibilities with this company? A. Responsible for directing all programming and development and procuring of programming and programming systems.

Q. And are you trained in the area of computers? A. I would say I am an expert.

Q. Are you also knowledgeable about the time involved? (157) • • •

Q. Well, let's go to the specifics of it and deal first with Oppenheimer Fund and, as I understand Mr. Wouters' testimony, the first thing that had to be done would be to transfer, in effect, the information from a certain number of keypunch cards into a tape. Is that what you would describe as a function or functional program? A. Yes.

• • • • •

(158) • • •

Q. What does that involve in terms of a program? A. Just a nominal amount of time.

Q. Like what? A. Less than a day.

Q. Less than a day? Can you give me any estimate as to what the cost would be to do that? A. I wouldn't estimate the cost.

Q. Can that be done A. Yes, that can be done.

> *Mr. Ruby* (To the reporter). All right, I would ask that you leave a blank there and that (159) the witness fill in the information as to the estimate of doing that.
>
> [See additional information, *infra.*]

• • • • •

Q. • • • [C]orrect me if I am wrong, (160) but I am trying to recall as best that I can Mr. Wouters' testimony, and I think he talked in terms of obtaining this tape and then comparing it with the master tape so that the names and addresses of these people could be obtained. A. Right.

Q. Can you tell me then in terms of what is involved, in terms of what you would estimate to be the time or expense involved in carrying it through along those lines? A. Well, the sorting step, first of all, the problem with the sorting step would be—I wouldn't estimate the time, the amount of time required there, because there are some questions in terms of volume and the calculations that would be necessary and the configurations that would be necessary to handle the volume of data that is required, and I think there are some problems relative to the volume of data here.

• • • • •

(161) • • •

Q. All right, the data that you are talking about, when you are talking about the volume of data, (162) is the account number and the information relating to a purchase on a particular date. That's the data we are talking about, are we not? A. Right, and the number of those items that you would have.

Q. All right. Now, from this you would get a tape, would you not, which would have then the account numbers in numerical order? A. Right.

Q. And you would then compare that with the master tape, with addresses of the people; is that correct? A. Yes.

Q. And would that then produce or would that then require some program to then produce the addresses of the people that we have now identified? A. Yes.

Q. And what is involved in that in terms of the development of any program? A. Well, the problem you get into with some of this data is that it exists on a second generation (163) data file, which means that it is difficult to interpret that data, it is difficult to work with that data.

Q. I am not sure I follow you, what you mean by "second generation".

* * * *

A. It is not 360 data and most of your programmers who program, program 360.

* * * *

Q. That is a number of a machine? A. That's right, but that connotes a certain architecture, a machine architecture, a certain way data is represented, a certain way data is written. Okay, the data we are talking about is not in that mode.

Q. Well, is this much different from the data that you are dealing with? A. It is horrendously different.

* * * *

(166) * * *

Q. * * * All right, now going back to the question that I had put to you before, can you tell me in terms of the time involved all the expense involved of taking the tape which we now have to be sorted in numerical order with the numbers and then comparing it against the master tape so that you can get a printout of addresses for the people on the first tape? A. That comparison I would estimate, with the data problems involved, could be a matter of three to four weeks.

Q. Three to four weeks? A. Yes.

Q. What do you estimate to be the cost of that? A. I haven't attached a dollar cost to these.

Q. Are you talking about one or more people working fulltime for three or four weeks? A. Yes.

Q. How many people?

(167)

A. One person.

Q. One person? A. I will give you all my estimates in terms of man weeks when I say that, in man weeks.

Q. So you are talking about one person working fulltime for three or four weeks? A. Yes.

Q. Now, what do the people get paid generally of the type that you are talking about? What kind of salary does such a person get? A. The salaries probably range from $18 to, say, $28, $30 an hour.

Q. All right, I would like you to again fill in for me the amount of time and the expense of this particular program so that I have a better idea of what we are talking about in terms of the work involved. Let me go now for a moment to OSCAP. Mr. Wouters indicated that there you would not have any keypunch cards and that the information would be directly obtained from a tape and you would get the account numbers of the people who purchased during a certain period; is that correct?

(168)

A. Right.

Q. And he also talked about another tape which referred to people who reinvested dividends, and you would have to take the information off that tape and in effect, perhaps in a layman's description, you would be combining the two tapes; is that correct? A. Right.

Q. And then you would compare that against the master tape of the OSCAP plan holders so that you would get the names and addresses of the current OSCAP shareholders; is that correct? A. Right.

Q. And then he talked about a fourth thing, which would be in effect the printing out of address slips in connection with it? A. Yes.

Q. Now can you tell me what is involved in terms of the time and expense involved in any of these programs? A. Those things would involve something I would estimate on the range of a month to do. There are a couple of problems that you have in this (169) area, that you are dealing with two tapes, that those tapes are different in format from the previous file that we were talking about and those tapes are different from each other because—well, there was a file conversion that went on in the period of time that we are talking about.

Q. Now I would like you also to fill in in the transcript in as precise a manner as you can, after you have had an opportunity to reflect upon it, the time and expense involved in each of these stages that we have just been discussing.

> *Mr. Ruby:* And I would like the reporter to leave a space for the witness to do so.
>
> [See additional information, *infra.*]

(171) * * *

Q. Well, understand, Mr. Sebastian, what I am trying to understand is how Mr. Wouters arrived at a figure of $7500. Now, presumably it was based upon what you told him because he has testified that he doesn't have an independent way of making that judgment himself, he relied

upon you, so it must be information that you provided to him which resulted in the $7500, and I am trying to understand from you what it is that you would have told him that would have resulted in this figure. Can you tell me anything that can give us some illumination on that? A. I can't recall any specific time estimates.

* * * * *

(185) * * *

Q. The computer function then that I am asking you about is, in effect, when you are sending out a mailing, which I have stipulated in my question would be, let's say, basically a forwarding of the quarterly report to all shareholders of Oppenheimer Fund and OSCAP. What I am asking you is to tell me what additional time and expense might be involved in writing into this computer program a direction that the (186) people who have been identified by this program we have just been discussing, that is to those people an additional piece of paper is going to go in their mailing?

[See additional information, *infra.*]

* * * * *

Information needed
on Deposition J. Wouters
Oppenheimer Case*

Page 16

Number of Shareholders OSCAP	85,176 per 8/31/73
Number of Shareholders Oppenheimer Fund	86,019 per 8/31/73

Page 37

Salary Ranges:
Salary Range Keypunch Operator

	Minimum	*Midpoint*	*Maximum*
Key Punch Operator	102	112	122
Senior Key Punch Op.	114	127	140
Lead Key Punch Op.	120	135	150
Key Punch Super	144	164	184
Key Input Controller	136	154	172

Rates do not include 15% premium for late shift work.

Page 38

Rental Cost of Keypunch Machines

Card Data recorder Model 129—$160.00 per month

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* This additional information is keyed to the page of the transcript of the deposition of Investment Company Services Corporation at which plaintiffs' counsel requested such supplementary information.

Page 39

Attached is a clerical cost computation for the various departments within ICSC. Department 64-04, which is the Keypunch department, is listed at a cost per hour of $6.81 for all types of keypunching. This amounts to a cost figure and does not include profit.

Due to the relatively uncomplicated keypunching involved in this case, the cost for this specific job has been set at $6.00.

* * * * *

Pages 43-49

There are 269 days in the period 3/28-68 to 4/25-69. We counted the purchases for 3/28 to 4/1-68, the purchase for 10/21 to 10/24-68 and 4/23 to 4/25-68. The average number of purchases per day was 248, which number multiplied by 269 would give an estimate of 66,712 transactions between 3/28-68 and 4/25-69.

There are 248 days in the period 4/25-69 to 4/24-70. We counted the purchases for 4/25 to 4/29-69, the purchases for 10/6 to 10/8-69 and 4/22 to 4/24-70. The average number of purchases per day was 332 which number multiplied by 248 would give an estimate of 82,336 transactions between 4/25-69 and 4/24-70.

On the basis of the above mentioned tests the total number of cards could be estimated at 149,048. A keypunch and verification test showed that 980 cards were produced in 2.75 hours. We added 10% for lost time and reduced speed during extended jobs and arrived at an estimate of

474 hours at $6.00 = $2844. If the estimate proved to be too low then, of course, the cost would increase.

* * * * *

Page 63

Attached is a computation of computer costs per hour dated 3/20/73 and three worksheets pertaining to that computation. Since the programs have not yet been designed it is not possible to determine exactly what computers or what computer components will be used. Therefore, an estimate of $150.00 per hour was made, which is less than the cost of the most frequently used computers (the 360/40 and 360/50).

* * * * *

F. Sebastian

Page 159

The estimated cost for one day of programming work is $14.36 + 50% per hour × 7.5 = 161.55. Reference is made to the cost computation by Department within ICSC (answer to question on page 39).

Page 169

Using the data available for OSCAP, a program is required to select those accounts with purchases during a specified time frame and to sort these and construct a file that can be matched against the current OSCAP file for purposes of identifying these accounts on the current file for a subsequent listing or mailing. The estimated time required for the program to select the accounts is one week of programming or a cost of $807.75.

A sort is required for the OSCAP data and a sort is required for the Oppenheimer Fund data the estimated programing time to prepare these two sorts is a total of three days or $452.34.

The file for the Oppenheimer accounts must then be matched against the current Oppenheimer master file and the accounts in this group identified on the current master file for subsequent listing or mailing. This program is estimated to require not more than three weeks for a single programmer with a maximum cost of $2,423.25. The same procedure would be required for the OSCAP data and the current OSCAP file. The program for OSCAP would be a variation of that used for the Oppenheimer Fund and would have an incremental time requirement of two days and a cost of $301.56.

There is no difference in the programming cost between selecting accounts for the entire period 3/28/68—4/24/70 or for the period 3/28/68 to 4/25/69.

Machine time for testing the various programs is estimated to take five hours at $150.00 = $750.00.

The total estimated cost of developing programs would therefore be $4,735.00 which is lower than our original estimate of $7,500.00 due to the fact that we were not aware of the possibilities to reduce programing cost by using virtually the same program on both Voluntary and Contractual Funds.

We have recently discovered that there may be an alternative method employed which could possibly eliminate the need for keypunching. This method will require additional programing costs which would, however, be less than the possible savings due to elimination of keypunching.

• • • • •

Page 186

The estimated cost is two days of programing work which is 2 × 7½ × 21.54 = $323.10. Reference is made to the cost computation by Department within ICSC (answer to question on page 39).

FILED

SEP 30 1977

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY and EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV and RITA SHAEV,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY and EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV and RITA SHAEV,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted in opposition to the petition by the defendants for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 22, 1977 which, after rehearing en banc, affirmed the order of the United States District Court for the Southern District of New York, which determined, among other things, that under the facts and circumstances of this case, defendant Oppenheimer Fund, Inc. (the "Fund") should bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes. The Court of Appeals held, on the basis of the record in this case, that the District Court did not abuse its discretion in entering said order.

Question Presented

Did the District Court, based upon the record in this case, abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes?

Statement of the Case

A. *The Pleadings*

This consolidated action was brought by plaintiffs representatively on behalf of themselves and other persons similarly situated who purchased shares of the Fund subsequent to March 15, 1968 and derivatively on behalf of the Fund, which is an open-ended investment fund registered under the Investment Company Act of 1940 with net assets in excess of $500,000,000. These consolidated actions, which are based upon alleged violations of the Securities Act of 1933 (15 U.S.C. Section 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. Section 78a *et seq.*) and the Investment Company Act of 1940 (15 U.S.C. Section 80(a) *et seq.*), and various rules promulgated thereunder, are brought against defendant Oppenheimer Management Corporation (the "Manager"), which is the investment advisor to the Fund and the general distributor of its shares; defendant Oppenheimer & Co., which owns all of the voting stock of the Manager, and the individual defendants, who are directors of the Fund. Some of the individual defendants are also officers of the Fund, officers and directors of the Manager and/or partners in Oppenheimer & Co.

The complaints in these consolidated actions allege, in substance, that the defendants caused the Fund to issue prospectuses and reports that were false and misleading, in that, among other things, they failed to state that the Fund would purchase "restricted" securities, and failed to describe the risks involved in such purchases. The complaints further allege, in substance, that the defendants caused the Fund to value improperly the restricted securities in the Fund's portfolio, thereby overstating the net asset value of shares of the Fund which were sold to the public, that the defendants caused the Fund to issue prospectuses and reports which were falses and misleading in failing to disclose material information relating to the improper valuation of restricted securities in the Fund's portfolio, that the aforesaid conduct constituted a breach of fiduciary duties to the plaintiffs and the class and that, as a result of the foregoing, persons who purchased shares of the Fund subsequent to March 15, 1968 were caused to pay false and inflated prices for their shares of the Fund. The complaints further allege that, as a result of said improper valuation of restricted securities, the Fund was caused to pay the Manager excessive fees under its management agreement and to redeem shares at inflated prices. The plaintiffs seek to recover damages on behalf of the members of the class who paid excessive prices for their shares of the Fund;[1] and derivatively, on behalf of the Fund, to recover any damages sustained by the Fund and the profits made by the other defendants, including the excessive fees paid to the Manager.

The defendants have served amended answers denying any wrongdoing and asserting various affirmative defenses; including an alleged set-off against those members of the class who redeemed shares of the Fund since March 1968, for allegedly excessive amounts as a result of the overvaluation of restricted securities in the portfolio of the

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[1] The total aggregate damages suffered by the class has been estimated to be in the area of $1,500,000.

Fund. In addition, the defendants other than the Fund have asserted in their amended answers that, if they are liable to the class by reason of the overvaluation of restricted securities in the portfolio of the Fund, then the Fund is liable to them to the extent that the Fund has received funds from plaintiff and members of the class by reason of such overvaluation.[2]

B. *Prior Proceedings*

The three consolidated actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively, and were consolidated for all purposes by order of the Court dated December 17, 1969. Thereafter, the plaintiffs conducted extensive discovery proceedings, some of which, as indicated below, related to the identification of class members and the method and cost of sending notice to the class, including the service of two sets of interrogatories, the examination of numerous documents and the oral examination of several officers and directors of the Fund and the Manager and the deposition of the Fund's transfer agent.

C. *The Class Action Motion*

On March 30, 1973, plaintiffs moved for an order pursuant to Rule 23(c)(1) of the F.R.Civ.P. declaring that this consolidated action may be maintained as a class action on behalf of all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 (hereinafter referred to as "the class period"). In support of their motion for a class action determination, plaintiffs set forth information showing that the requirements for a class action under Rule 23(a) and (b)(3) of the F.R.Civ.P. were met.

Following the submission of the class action motion in March 1973 (and after the Court of Appeals for the Second Circuit rendered its decision in *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (2d Cir. 1973) ("Eisen III"), the plaintiffs, with the approval of the Court, conducted some discovery (principally the deposition of the Fund's transfer agent) to obtain additional information relating to the composition of the class, the identification of class members and the method and cost of sending notice to the class. The defendants did not object to the proposed discovery, notwithstanding the fact that defendants stated that it would require the Fund's transfer agent to "assemble and compile information and statistical data," except that the defendants argued that the discovery should be conducted by the use of written interrogatories, unless the plaintiffs paid, in the first instance, and subject to ultimate taxation of costs, the expenses of attendance of an attorney for each of the defendants at the place where the deposition was to be taken (Boston, Massachusetts), including reasonable attorneys' fee to be fixed by the Court. The District Court, however, denied the defendants' application to require the discovery to be conducted by the use of written interrogatories and also denied the defendants' application to require the plaintiffs to pay, in the first instance, the expenses of attendance of an attorney for each of the defendants at the deposition.

Thereafter, the deposition of the Fund's transfer agent, pursuant to the Federal Rules of Civil Procedure, was taken, and the discovery disclosed the following information:

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[2] The assertion by the defendants (page 21) that the Fund is "devoid of any financial interest in the litigation", is clearly erroneous. It is evident from the amended answers of the defendants that they are seeking to hold the Fund liable to them to the extent that they are held liable to the class, by reason of the overvaluation of restricted securities in the portfolio of the Fund.

1. There were approximately 121,000 persons who purchased shares of the Fund during the class period;

2. The Fund currently had approximately 171,000 shareholders, of whom approximately 103,000 purchased shares of the Fund during the class period;

3. There were approximately 18,000 persons who purchased shares during the class period and were no longer shareholders of the Fund;

4. The names and addresses of the persons who purchased shares of the Fund during the class period could be culled out from the computer tapes of the Fund along with information indicating which of these persons were still shareholders of the Fund and which were not;

5. The cost of culling out the aforementioned information with respect to the names and addresses of class members, which would involve the use and programming of computers, would be approximately $16,000;

6. There would be a charge of $0.01 per insert in connection with inserting the notice to class members in a regular mailing by the Fund to its shareholders.

In December 1973, after the foregoing information had been obtained, plaintiffs, in an affidavit submitted to the Court, modified their application relating to the definition of the class and requested that this action be maintained as a class action on behalf of all persons who purchased shares of the Fund during the class period, and who, like the plaintiffs, were still stockholders of the Fund. This modification, it was noted, would simplify the issues in the case by eliminating, at least in part, the defense asserted by defendants in their amended answers, to the effect that

defendants were entitled to a set-off against those persons who purchased shares in the class period but thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the Fund's portfolio; it would facilitate the distribution of any recovery to the class and, most importantly, as explained below, it would obviate the need for culling out the names and addresses of the class members and would thus reduce the expenses involved in connection with the further prosecution of the case as a class action.

The definition of the class sought by plaintiffs would have obviated the need for culling out the names and addresses of the members of the class from the Fund's computer tapes in order to give notice to the class, since, if all of the members of the class were current shareholders of the Fund, the class notice could then be enclosed in a regular mailing by the Fund to all of its shareholders, which would include all the class members. Thus, the method of giving notice proposed by the plaintiffs would have provided for actual individual notice by mail to all members of the class apprising them of the pendency of the action and of their right to request exclusion from the class pursuant to the provisions of Rule 23. Furthermore, since the proposed class was defined by the plaintiffs with precision (all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund on a specified date prior to the mailing of the class notice), there would be no problem in entering a judgment in the action, whether favorable or not to the class pursuant to Rule 23(c)(3), describing the persons who were bound by the judgment.[3]

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[3] In the event of a recovery in the action, the names and addresses of class members would, of course, be ascertained in connection with the distribution of the recovery.

Plaintiffs stated that they would pay for the costs of preparing the necessary notices and would pay for any extra costs involved in mailing the class notice in the manner proposed by them, including the cost of inserting the notice in a regular mailing by the Fund to all its current stockholders. It was estimated that these costs, which the plaintiffs were prepared to pay, would be approximately $5,000. If it were necessary, however, to ascertain the names and addresses of the class members in order to give notice to the class, the total costs involved in connection with giving notice would be in excess of $20,000. The plaintiffs indicated that, if they were required to pay at that time the costs of identifying the class members as well as the costs of sending notice to the class, they would not continue prosecution of the action as a class suit.

The defendants opposed the definition of the class sought by plaintiffs which limited the class to persons who were still stockholders of the Fund, presumably because it would limit the *res judicata* effect of this action.[4] Defendants also objected to the distribution of the class notice in the manner proposed by the plaintiffs (by directing the notice specifically to those shareholders of the Fund who purchased during the class period and enclosing the notice in a regular mailing of the Fund to all of its 171,000 shareholders), claiming that this method would result in the notice being received by approximately 68,000 shareholders

of the Fund who were not members of the class, and that this would somehow have an adverse effect on the Fund, including allegedly precipitating a flood of redemptions by these shareholders. In response to defendants' objections, plaintiffs pointed out that, since 1970, the Fund had apprised its shareholders in its proxies, prospectuses and annual reports, no fewer than 13 times, of the pendency of this action, and the nature of the claims alleged herein, and of the fact that, in the opinion of their counsel, and counsel for the Manager, the suits have "no legal merit." Plaintiffs contended that the defendants had not made an adequate showing to support their claims of alleged harm, and that defendants' claims were motivated by a desire to maximize the costs involved in an effort to prevent the action from proceeding as a class suit, and that defendants had not raised any valid objections to the method of giving notice proposed by the plaintiffs.

All of the issues raised by plaintiffs' motion for a class action determination were fully explored and briefed by the parties and were carefully considered by the District Court prior to its decisions on the motion. On several occasions, the Court requested additional information and briefing with respect to various matters, including the definition of the class, the appropriate method of giving notice to the class in this case, the effect of the decision in *Eisen III*, and the appropriate allocation in this case of the cost of culling out a list of class members from the Fund's computer tapes under the discovery rules and in light of all the facts and circumstances in the case.

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[4] Since, at the same time, the defendants themselves sought to limit the class to persons who purchased shares of the Fund prior to April 25, 1969, it may well be that, in seeking to have the class defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class), the defendants were principally interested in increasing the expenses involved in connection with giving notice to the class in the hope that the district court would impose these added expenses upon the plaintiffs and that this would prevent the action from proceeding as a class suit.

Decision and Memorandum Order of the District Court

On May 15, 1975, the District Court rendered a decision determining that this consolidated action may be maintained as a class action under Rule 23(b)(3) of the F.R. Civ.P. on behalf of all persons who purchased shares of the Fund between March 15, 1968[5] and April 24, 1970.[6]

With respect to the definition of the class, the method of giving notice to the class and the allocation of the costs of culling out from the Fund's computer tapes the names and addresses of the class members, the District Court rendered a decision which took into account the respective positions and proposals urged by the parties with respect to these matters, and constituted the Court's considered judgment as to what would be a fair overall disposition of the matter, based upon the particular facts and circumstances in this case. The Court agreed to define the class as requested by the defendants to include those persons who were no longer shareholders of the Fund and agreed to defendants' related request that notice not be sent out in the manner proposed by the plaintiffs by including the notice in a regular mailing to all current shareholders of the Fund, thereby necessitating the identification of the specific names and addresses of class members in order to send notice to the class. With regard to the matter of culling out the names and addresses of the class members from the Fund's computer tapes, the Court determined that it would be appropriate, on the basis of the facts and

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[5] The starting date of the class period was modified in Judge Griesa's memorandum order of September 30, 1975, on consent of the parties, to March 28, 1968.

[6] The Court rejected the defendants' claim that the class should be limited to persons who purchased prior to April 25, 1969.

circumstances of this case, that this expense, which was necessitated by the defendants' requests with regard to the definition of the class and the method of giving notice to the class, be the responsibility of the defendants, and the Court indicated that the Fund should bear the cost of culling out from its computer tapes the names and addresses of the class members in this case. In reaching this decision, the District Court stated:

> "Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (6a)[7]

The District Court further determined that the plaintiffs would be responsible for preparing and mailing the necessary notices to the members of the class at their expense.

After all parties moved for reargument, the District Court, in a memorandum order dated September 30, 1975, denied essentially all of the motions for reargument. The District Court indicated in its memorandum order that the cost of culling out the list of class members shall be borne by the Fund without prejudice to the right of this defendant at the conclusion of the action to make whatever claim it would be legally entitled to make regarding reimbursement by another party;[8] and that, as to the mailing of notices, plaintiffs are to have the option of: (a) sending them out in their own mailing, or (b) including them in a regular mailing of the Fund, provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra cost of mailing, including the cost of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders.

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[7] References are to pages of Petitioners' Appendix.

[8] In its motion for reargument, the Fund had requested the Court to clarify its ruling as to which of the defendants are to bear the cost of culling out the names and addresses and, that, if the Court required the Fund to bear such cost, its ruling should set forth that the payment at this time is an advance and that there has been no determination of the question of contribution. It may be noted that the District Court had, in fact, already indicated, in its decision of May 15, 1975, that the Fund was to be responsible for this cost. The Manager, in its motion for reargu-

The Panel Decision

On June 30, 1976, a three judge panel of the Court of Appeals[9] determined that the granting of class action status was proper. A majority of the panel (Judge Hays dissenting) determined, however, that the order of the District Court directing the Fund to bear the cost of culling out the names and addresses of class members from the Fund's computer tapes should be reversed.

The Court of Appeals En Banc Decision

On September 14, 1976 the Court of Appeals granted the plaintiff's petition for a rehearing *en banc* with respect to the question of whether the District Court had committed reversible error in directing the Fund to bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes.

On rehearing *en banc,* the Court of Appeals[10] (Mulligan, Van Graafeiland and Meskill, *JJ,* dissenting) affirmed the

order of the District Court directing the Fund to bear the expenses of culling out the names and addresses of class members from the Fund's computer tapes.

The Court of Appeals stated that the information sought by plaintiffs as to the names and addresses of the members of the class was within the broad scope of permissible discovery established by the Federal Rules, and that Rule 34 which is specifically applicable to the discovery of computerized information provided an ample basis for the District Court's order directing the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. The Court of Appeals further stated that while the District Court has discretion under Rule 34 coupled with Rule 26 (c) of the Federal Rules to shift the cost of discovery of computerized information to the discovering party where the demand for information would impose upon the respondent "undue burden or expense", the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case. In reaching this conclusion, the Court of Appeals indicated that although compliance with the District Court's order involved an expenditure by the Fund of approximately $16,000, the Court of Appeals could not say that the burden thus imposed was unreasonable in light of the nature of the information sought and the extent and character of the Fund's business operations. The Court of Appeals also stated that the order of the District Court allocating the cost of discovery of the computerized names and addresses of the class members was not unreasonable in light of the District Court's definition of the class. The Court of Appeals noted that the cost of discovering the names and addresses of the class members was occasioned by the District Court's agreement to define the class as sought by the defendants.

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ment, asserted that, "[i]f the defendants are to bear the cost of preparing lists, such cost should be advanced in the first instance by the Fund, as provided in the Court's opinion (at p. 2)."

[9] The panel consisted of Circuit Judges Hays and Mulligan and District Judge Palmieri sitting by designation.

[10] The *en banc* court consisted of Chief Judge Kaufman and Circuit Judges Hays, Feinberg, Mansfield, Mulligan, Oakes, Timbers, Gurfein, Van Graafeiland and Meskill.

In conclusion, the Court of Appeals stated:

> ". . . we are not disposed to hold that the district court's refusal to impose on plaintiffs the cost of discovery of the computerized names and addresses was an abuse of discretion. Indeed, the order of the district court accommodated the competing interests in a manner which was fair and imaginative." [11] (46a)

Reasons for Denying the Writ

1. The issue in the instant case is whether the District Court, based upon the facts and circumstances in this case abused its discretion in directing the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes. While the resolution of this issue is of significance to the parties, it does not involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The facts and circumstances in this case are peculiar to this case and are not likely to recur. Accordingly, review by this Court is not warranted. *United States* v. *Shannon,* 342 U.S. 288 (1952) (concurring opinion of Mr. Justice Frankfurter).

In a vain attempt to bolster their position, defendants erroneously suggest that the decision by the Court of Appeals below will "require" not only defendants, but also non-parties, such as brokerage houses, to bear the expense of providing information as to the names and addresses of class members. (Defendants' Petition, p. 24) First of all, the decision by the Court of Appeals affirming the District Court's discretionary determination on the basis of the record in this case does not "require" a district court in another case involving different facts and circumstances to determine that the defendant should bear the cost of providing the information as to the names and addresses of class members. Furthermore, as indicated by the Court of Appeals in *In re Penn Central Securities Litigation,* No. 76-2139 (3rd Cir. Aug. 5, 1977), *reversing* 416 F. Supp. 907 (E.D. Pa. 1976), the decision by the Court of Appeals below did not pass upon the various issues involved in the *Penn Central* case or the other cases cited by defendants on page 24 of their petition, concerning the obligations of brokerage houses who hold shares for their customers in street name to provide information as to the identity of their customers and/or to mail the notice to said customers.

2. The decision by the Court of Appeals below does not conflict with the decision by the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977), as contended by defendants. In *Nissan,* the Court, after noting that its "review of the class action issues raised in this appeal is limited to whether the district court abused its discretion," (552 F.2d at 1096), considered the particular facts and circumstances involved in the case, and on the basis thereof, the Court determined that plaintiffs should be required at their expense to compile a list of the names and addresses of the class members from the defendants' business records. The Court did not base its determination on any hard-and-fast rule as to which party should bear the expense of obtaining information with respect to the names and addresses of class members. Indeed, the Court noted that "[e]xamination of the decisions treating this question reveals that . . . both plain-

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[11] The Court of Appeals noted that its affirmance of the District Court's order was without prejudice to a claim by the defendant Fund for discretionary taxation of the cost of discovery against plaintiffs, should the plaintiffs ultimately lose.

tiffs and defendants have been ordered to compile information necessary to the identification of absentee class members," and that, in almost all of these cases, the district courts had appeared to have adopted a "rule of reason" approach involving the determination of which of the parties would have the easier task of gathering the information sought (552 F.2d at 1101). Furthermore, while indicating that in their opinion the discovery rules should not "control the question's final resolution," the Court in *Nissan* stated that "the spirit of those rules and the decisional law developed under them may offer guidance in resolving which party should furnish absentee class members' names and addresses" (552 F.2d at 1102). It is, thus, apparent that the decision in *Nissan* requiring the plaintiffs to bear the expense of compiling a list of the names and addresses of class members is based upon the particular facts involved in that case.

The facts and circumstances in *Nissan,* however, are quite different from those in the instant case. For example, in *Nissan* the information as to the names and addresses of class members was not contained in computer tapes, as in the instant case, but rather in the defendants' ordinary business records. Indeed, in reaching its decision, the Court in *Nissan* carefully distinguished the decision in *Foster* v. *Maryland State Sav. and Loan Ass'n.,* 1974-2 CCH Trade Cases ¶ 75,277 (D.D.C. 1974), where the defendant was required to bear the cost of providing the names and addresses of class members on the ground that, in *Foster,* the names and addresses of the class members were contained in the defendant's computer tapes. Furthermore, in *Nissan,* unlike the instant case, the defendants had not sought to have the class defined in a manner that necessitated the expense of obtaining information as to the specific names and addresses of class members.

We respectfully submit that the fact that the Court of Appeals below determined, on the basis of the facts and circumstances in this case, that the District Court had not abused its discretion in requiring the defendant Fund to bear the cost of culling out the names and addresses of class members from its computer tapes, while the Court in *Nissan,* in deciding whether the district court there had abused its discretion, based on a significantly different set of facts and circumstances, determined that the plaintiffs should bear the cost of compiling a list of the names and addresses of class members from the defendants' business records, does not constitute "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." (*Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). This Court has dismissed a writ of certiorari as improvidently granted when it appeared that the asserted conflict in decisions arose "from differences in states of fact and not in the application of a principle of law." (*Wisconsin Electric Co.* v. *Dumore Co.,* 282 U.S. 813 (1931)).

3. The decision by the Court of Appeals below does not conflict with the decision by this Court in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) ("Eisen IV"). As shown more fully in the Argument below, this Court did not hold in *Eisen IV* that information as to the names and addresses of class members may not be obtained through discovery or that the cost of discovering or obtaining this information must be borne in each case by the plaintiff as part of his obligation to bear the cost of printing and mailing the notice to the class. In this connection, it may be noted that none of the cases cited by the defendants in their petition has held that the plaintiff must bear the cost of obtaining information as to the names and addresses of class members on the ground that *Eisen IV* requires the plaintiff to

bear these costs in each case. On the contrary, as shown in the Argument below, in all of these cases, the question of whether the cost of discovering or obtaining information as to the names and addresses of class members should be borne by the plaintiff or the defendant has been determined on the basis of the particular facts and circumstances in each case. The defendants' contention that the decision below, holding that the District Court, based upon the peculiar facts and circumstances in this case, did not abuse its discretion in directing the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes, is in conflict with the decision by this Court in *Eisen IV,* is, we respectfully submit, totally unfounded.

4. It is well settled that the district courts have broad discretion in dealing with discovery matters, and that discretionary judgments of the district court should not be disturbed absent an abuse of discretion. In the instant case, the Court below determined that the District Court had not abused its discretion. This Court has traditionally declined to review cases involving such discretionary determinations. *Moor* v. *Texas & N.O.R. Co.,* 297 U.S. 101, 105 (1936); *Cf. National Labor Relations Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498, 503 (1951).

5. As shown in the Argument below, the decision by the Court of Appeals is well supported by the record in this case and by applicable authorities.

ARGUMENT

The District Court Did Not Abuse Its Discretion, Based Upon the Record in This Case, in Requiring the Fund to Bear the Expense of Culling Out the Names of Class Members From Its Computer Tapes.

Information as to the names and addresses of class members is relevant to the subject matter of a class action and may be obtained under the discovery rules. As the Court below stated:

> "It hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery established by our Federal Rules. Under Rule 26, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .' Fed. R. Civ. P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are 'relevant to the subject matter' of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. *See Appleton Electric Co.* v. *Advance United Expressways,* 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.,* 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972)."[12] (40a)

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[12] *See also, Hickman* v. *Taylor,* 329 U.S. 495, 507 (1947) where this Court indicated that the discovery rules "are to be accorded

The defendants contend that information as to the names and addresses of class members may not be obtained pursuant to the discovery rules. Defendants argue that discovery of information relating to the identification of class members must be distinguished from discovery of information generally, presumably because the former relates to class action requirements in the case. Carried to its logical conclusion, the defendants would make the discovery rules inapplicable to other matters (in addition to the identification of class members) that are germane to the requirements for maintaining a suit as a class action under Rule 23, such as the description of the class, the number of class members, etc.[13] Indeed, the defendants appear to

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a broad and liberal treatment"; *Burstein* v. *Slote*, 12 F.R.Serv.2d 577, 580 (S.D.N.Y. 1968); and *Chevalier* v. *Baird Sav. Ass'n*, 72 F.R.D. 140, 148 (E.D. Pa. 1976).

In *Burstein* v. *Slote, supra*, the Court said:

> "*In view of the mandatory notice requirements of Rule 23(c) (2)* (once an action is judicially determined to be maintainable as a class suit), and no indication present that plaintiffs are abusing the discovery rules so as to harass defendants, *plaintiffs are permitted to inquire of defendants on oral examination as to the names of the purchasers of securities of Manufacturers Credit Corp. and its related entities . . .*"
>
> "Plaintiffs, of course, may not use this information to notify other members of the putative class of the pendency of these actions unless and until they are denominated class actions by court order." (Emphasis supplied.) 12 F.R.Serv.2d at 580.

In *Chevalier* v. *Baird Savings Assoc., supra*, the Court stated:

> ". . . we agree with plaintiffs that the names of the class members are discoverable. Quite clearly they fall within the ambit of rules 34 and 26(b) of the Federal Rules of Civil Procedure. And since the cost of identification would be fairly nominal for the defendants (approximately $14,500 spread over 22 banks) we are inclined to think that we would not enter a protective order, or require plaintiffs to reimburse defendants for the costs of collecting this information."

[13] If this were the case, plaintiffs might find it impossible to demonstrate to the Court that the various requirements of Rule 23 had been satisfied.

argue that information that has "nothing whatsoever to do with the merits of plaintiffs' claims of wrongdoing," even though it bears upon the requirements of maintaining the action as a class suit, is outside the scope of discovery (Defendants' Petition, pp. 18-19). This contention is, however, clearly unsound and unfounded in either the federal rules or in case law.[14]

The defendants also make the rather disingenuous argument that, while information as to the names and addresses of class members may be relevant in determining whether the requirement of Rule 23(c)(2) that individual notice be sent to all members of the class who can be identified through reasonable effort has been satisfied, the fact that this issue has not yet been presented to the Court for adjudication makes said information irrelevant to the subject matter of this class action. It is evident, however, that information that is otherwise relevant to the subject matter of the action, and thus, within the permissible scope of discovery, is not rendered irrelevant and outside the scope of discovery, as defendants urge, simply because, the issue with respect to which the information relates has not yet been presented to the Court for adjudication.[15] Defendants' assertion (at page 26 of their petition) that "if this action proceeds as a class action, proper notification will not be an issue in this case, since all of the members of the class can be identified and notice can be mailed to each member," simply begs the question. The issue of whether the requirements of Rule 23(c)(2) have been satisfied depends upon information with respect to the names and addresses of the class members that is contained in the Fund's computer tapes and, thus, this information is clearly relevant to the subject matter of this action.

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[14] See cases cited, *supra*, pages 19-20. See also *Branch* v. *Reynolds Metals Co.*, 17 F.R. Serv.2d 494 (E.D. Va. 1972); *Dickerson* v. *United States Steel Corp.*, 18 F.R. Serv.2d 554 (E.D. Pa. 1974); *Shapiro* v. *Merrill Lynch*, 70 Civ. 3653 (S.D.N.Y. July 11, 1974) (unreported decision).

[15] It is well recognized that information sought to be discovered need not even be relevant to the "issues" in the case and that "relevancy to the subject matter is all that is required". 8 Wright & Miller, Federal Practice & Procedure §2008 at 41-42.

The fact that Rule 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," does not, as defendants contend, indicate that the identification of class members is not subject to discovery. If this were true simply because the identification of class members is referred to in the same paragraph of Rule 23(c)(2) as the provisions for giving notice to the class, it would also follow that information relating to whether the members of the class "can be identified through reasonable effort" or what is "the best notice practicable under the circumstances," which are also referred to in the same paragraph of Rule 23(c)(2), would not be obtainable through discovery. Yet, in this very case, discovery was permitted by the District Court, without objection by the defendants, with respect to these matters and other matters relating to the method and cost of sending notice to the class. If such information may be obtained through discovery, there is no logical basis for the contention that information relating to the names and addresses of class members is not subject to discovery; and the courts have specifically recognized, as indicated above, that, because of the mandatory notice requirements of Rule 23(c)(2), a plaintiff should be allowed to obtain information pursuant to the discovery rules as to the names of class members.

It is also suggested by the defendants that, since the information as to the names and addresses of class members

is sought solely for the purpose of enabling plaintiffs to fulfill their obligations under Rule 23, (and, in particular here, the requirements under Rule 23(c)(2), that individual notice be mailed to all members of the class who can be identified through reasonable effort) the cost of discovering such information should be borne by the plaintiffs. The defendants assert (p. 19) that all costs "solely attributable to instituting a class suit," (which would presumably include the cost of all discovery relating to the class action requirements under Rule 23), should be borne by the plaintiffs and that the district courts, in allocating the expenses of discovery, should be required to differentiate between information that is relevant only to the class action requirements of the case and information that is relevant to the merits generally. No such distinction is dictated by Rule 23, by the federal discovery rules or by *Eisen IV*. In *Eisen IV*, this Court held that the costs of printing and mailing the notice are in the usual case the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV*, *supra*, at 179. The expenses involved in the discovery of information, however, have not been automatically regarded as part of the ordinary burden of a party of financing his own suit, but rather the allocation of such expenses has traditionally rested within the sound discretion of the district courts. *Eisen IV*, which did not even deal with the question of obtaining information as to the names of class members, did not hold that all "costs attributable to instituting a class suit," including the costs of discovering or obtaining information relating to the class action requirements, must be borne by the plaintiff in each case, notwithstanding the well-settled rule that the allocation of these expenses should rest in the sound discretion of the district court.[16] Matters pertaining to discovery of information, whether they relate to class action matters, as in the instant case, or to the merits of the case, have been left to the sound discretion of district courts; and the district courts' determinations with respect to the allocation of discovery expenses have been disturbed only upon a showing that there has been abuse of discretion.[17]

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[16] We agree with defendants' assertion that this Court in *Eisen IV* did not intend to distinguish between "class actions and other

The defendants' contention that a substantial majority of the relevant cases have made no distinction between the costs of printing and mailing the notice and the costs involved in obtaining information as to the names and addresses of class members, is totally unfounded. In the cases referred to by defendants (Defendants' petition, p. 15, fn.17), the question of whether the cost of discovering or obtaining information as to the names and addresses of class members should be borne by the plaintiffs or the defendants was determined by the court on the basis of the particular facts and circumstances in each case, notwithstanding the fact that *Eisen IV* requires the plaintiff to bear the cost of printing and mailing the notice. If the cost involved in discovering or obtaining information as to the names and addresses of class members had been simply regarded in these cases as part of the cost of printing and mailing the notice, as defendants urge, then these decisions would not have turned upon the particular facts and circumstances in each case, as they do, nor would they have resulted in the costs being borne by the defendants[18] in some cases and the plaintiffs[19] in others. None of the

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forms of adversary proceedings". (Defendant's petition page 19.) Yet, this is precisely what defendants urge this Court to do by seeking to have this Court distinguish between the discovery of information that is relevant to the subject matter of a class action and the discovery of information in other forms of adversary proceedings.

[17] The assertion by the defendants that the decision below is improper because it forces the defendants to subsidize the suit against them, is without merit. A defendant in any law suit, whether it be a class action or not, is frequently required to bear substantial expenses in connection with discovery conducted by the plaintiff. Thus, it could be argued in any case that whenever a defendant is required to bear the cost of providing information to the plaintiff in connection with discovery, which information may be used by the plaintiff in prosecuting his suit, that the defendant has been forced to subsidize the suit against himself. It is well settled, however, that it is not improper, per se, for a defendant to be required to bear such expenses. The issue is, rather, whether compliance with the discovery demand would impose upon the defendant "undue burden or expense." The determination of this issue rests within the sound discretion of the district court. *Baker* v. *F & F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories,* 384 F.2d 97 (2d Cir. 1967); *Harvey* v. *Eimco Corp.,* 28 F.R.D. 381 (E.D. Pa. 1961).

[18] *E.g., Foster* v. *Maryland State Sav. & Loan Ass'n, supra; Chevalier* v. *Baird Sav. Ass'n., supra; Richardson* v. *Hamilton International Corp.,* 62 F.R.D. 413 (E.D.Pa. 1974); *Hawkins* v. *Holiday Inns, Inc.,* 1975-1 CCH Trade Cases ¶ 60,153 (W.D.Tenn. 1975); *City of New York* v. *Darling-Delaware, Inc.,* 1976-1 CCH Trade Cases ¶ 60,812 (S.D.N.Y. 1976); *Herbst* v. *Able,* 47 F.R.D. 11 (S.D.N.Y. 1969); *Berland* v. *Mack,* 48 F.R.D. 121 (S.D.N.Y. 1969). In each of these cases, the information with respect to the names and addresses of class members, as in the instant case, was in the possession of the defendants. In *Foster,* the information was contained in the defendants' computer tapes.

[19] *E.g., In re Nissan Motor Corp. Antitrust Litigation, supra,* (discussed at length, *supra,* at pp. 15-17); *State of Illinois* v. *Harper & Row Publishers,* 301 F.Supp. 484 (N.D.Ill. 1969) (information in possession of plaintiffs); *In re Sugar Industry Antitrust Litigation,* 73 F.R.D. 322 (E.D.Pa. 1976) (information available from public lists or non-party business organizations); *In re Antibiotic Antitrust Actions,* 333 F.Supp. 278 (S.D.N.Y. 1971), (information in possession of plaintiffs or available from non-party sources); *Grad* v. *Memorex Corp.,* 61 F.R.D. 88 (N.D.Cal. 1973) (plaintiff agreed to pay cost of identifying class members).

There is no "clear conflict of authority" in the Eastern District of Pennsylvania as to the question of which party should bear the expense of obtaining information with respect to the names of class members, as erroneously contended by defendants (Deft's. Pet., pp. 15, 16, footnote 17). In *Chevalier* v. *Baird Sav. Ass'n., supra,* and *Richardson* v. *Hamilton Int'l. Corp., supra,* the courts cases cited by the defendants support their contention that in each case, plaintiffs *must* bear the expenses involved in obtaining information as to the names and addresses of class members as part of their obligation under *Eisen IV* to bear the costs of printing and mailing the notice.

It is well recognized, as noted earlier, that the district court has wide discretion in matters of discovery, including the allocation of expenses relating thereto, and that the discretionary judgment of the district court in the realm of discovery should not be disturbed absent a showing of abuse of discretion.[20] (See cases cited, p. 24, footnote 17.) Rule 34 of the Federal Rules, which is specifically applicable to the discovery of computerized information, provides

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determined that the defendants should bear the cost of obtaining information as to the names and addresses of class members from their records based upon the facts in those cases, while in *In re Sugar Industry Antitrust Litigation, supra,* the court determined that the plaintiffs would have to bear the expense of identifying the class members where the information relating thereto was not in the possession of the defendants but rather could be obtained from non-party trade associations and from published lists, and in *B&B Investment Club* v. *Kleinert's, Inc.* [1973-74 Transfer Binder], CCH Fed.Sec.L.Rep. ¶ 94,451 (E.D.Pa. 1974), the court cited with approval the procedure in *Berland* v. *Mack, supra,* where the defendant was required at its expense to furnish to the plaintiffs a list of the names and addresses of the members of the class. Neither *In re Sugar Industry Antitrust Litigation, supra,* nor *B&B Investment Club* v. *Kleinert's, Inc., supra,* holds, as defendants erroneously state: "that the cost of identification was part of the cost of notice which must be borne by the class representatives."

[20] In *Brown* v. *Thompson,* 430 F.2d 1214, 1216 (5th Cir. 1970), the Court, in reviewing a discretionary determination by the district court in a discovery matter, observed:

> "The judges of the Court of Appeals might well feel that under like circumstances they would have exercised the judicial discretion in a manner different from that in which it was exercised by the trial court. But this is not a basis for reversing the determination of the trial court. The test is whether there has been an abuse of that discretion. . . ."

ample foundation for the District Court's order in the instant case requiring the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. As noted by the Court of Appeals, the 1970 amendments to the Federal Rules rendered Rule 34 specifically applicable to the discovery of computerized information:

> "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations, from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data." Advisory Committee Note, 48 F.R.D. 459, 527 (1970). (41a)

It is also well settled, as noted above, that under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data, even though a considerable burden or expense may be involved. If the information sought is relevant, a responding party, under the federal discovery rules, in order to shift the expense to the other side, must show not only that the request for information is burdensome or expensive but that the burden or expense is so excessive as to be unreasonable or oppressive. Specifically, with regard to the obligation of a responding party under the Federal Rules to provide information that is contained in computer tapes, Professors Wright and Miller state, in their well-known treatise:

> "The responding party who is required to prepare a print-out or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.' In many instances the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system." 8 Wright & Miller, Federal Practice and Procedure, § 2218 at 659. (Footnote omitted.)

The Court of Appeals below, while, of course, recognizing that the District Court has discretion under Rule 34 coupled with Rule 26(c) to shift the expense of special computer programming to the discovering party where the demand for information would impose upon the respondent "undue burden or expense," held that the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case.

In reaching this conclusion, which is well supported by the record in this case, the Court of Appeals referred to several factors. First of all, the Court indicated that, although compliance with the District Court's order would require an expenditure by the Fund of approximately $16,000, "we cannot say the burden thus imposed is unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations" (44a).[21] In contending that the Court of Appeals

should not have given any consideration to these factors, the defendants have totally confused the issue. In concluding that the expense involved was not unreasonable, the Court of Appeals did not, as defendants seem erroneously to suggest, base its determination upon a comparison of the relative resources of the defendant Fund and the plaintiffs. Rather, the Court of Appeals considered whether, in light of the nature of the information sought and the extent and character of the Fund's business operations, the burden of compliance with the discovery demand in this case was excessive.[22] It was clearly not improper for the Court of Appeals to have taken into account the foregoing facts in determining whether the District Court had abused its discretion in this case. Defendants' assertion that the Court of Appeals was precluded from considering these factors in *Eisen IV* is completely unfounded.

As indicated by the Court of Appeals, the order of the District Court allocating the costs of discovery of the computerized names and addresses of the class members was not unreasonable, moreover, in light of the District Court's definition of the class as sought by the defendants.

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[21] In reaching this conclusion, the Court of Appeals noted that the cost to the fund (which has net assets in excess of $500,000,000) of identifying the names and addresses of each present or former shareholder who is a member of the class, was only $.13; that computers may occasionally make information more difficult to discover, and that even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used; and that it was scarcely unreasonable to demand of a respondent that it employ its computer resources to provide discoverable information of a relatively simple nature where, as in the instant case, the respondent Fund makes extensive use of computers in the operation of its business.

[22] In this connection, the Court of Appeals also observed:

> "There is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple. Great corporations, for example, must expend millions to provide to the government information necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars." (44a-45a)

The plaintiffs had sought to redefine the class to exclude former shareholders of the Fund, which would have obviated the need for culling out the names and addresses of class members from the Fund's computer tapes and would have allowed the individualized notice mandated by *Eisen IV* to be inserted, at small expense, in one of the Fund's regular mailings. The defendants, however, opposed the class redefinition, presumably because it would limit the *res judicata* effect of this action, and defendants also opposed the proposed method of notice, on the ground that the proposed notice to all the Fund's shareholders would allegedly prejudice the Fund by notifying shareholders of the Fund not involved in the litigation.

The District Court agreed to have the class defined and notice given in the manner requested by the defendants, thereby necessitating the added cost of discovering the names and addresses of class members from the Fund's computer tapes, which cost the District Court required the Fund to bear, noting that:

> "[w]hether this would be the correct allocation in other cases, I do not attempt to say but here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (6a)

Notwithstanding the foregoing statement by the District Court, the defendants argue that, since the District Court rejected the plaintiffs' proposed redefinition of the class, the District Court, in allocating this added cost of discovery, should not have taken into account the fact that this added cost was attributable to the defendants' request with regard to the definition of the class. What the defendants clearly ignore is that the District Court's rulings in this case with regard to the definition of the class, the method of giving notice and the allocation of the costs of culling out the names of class members from the Fund's computer tapes were obviously interrelated and reflect the District Court's considered judgment as to a fair overall disposition of this matter, taking into account the respective positions and proposals urged by the parties with respect to these matters. The District Court could have defined the class as proposed by the plaintiffs, consistent with the principles of Rule 23,[23] but determined

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[23] In this connection, the Court of Appeals stated:

> "The considerations advanced by the defendant in opposition to plaintiffs' proposed class redefinition were undoubtedly entitled to some weight; still, they did not *require* the class definition ultimately accepted by the district court. *See Eisen IV*, 417 U.S. at 179 n.16 and *Eisen III*, 479 F.2d at 1023 (Oakes, *J.*, dissenting from denial of rehearing en banc) (raising possibility that class may be divided into subclasses pursuant to Rule 23(c)(4) so as to minimize cost of notice borne by representative plaintiff). *Cf. Eisen III*, 479 F.2d at 1009 n.5 (suggesting that notice may be included in regular mailing by defendant to class members)." (Emphasis supplied by the Court.) (46a)

See also, Dolgow v. *Anderson*, 43 F.R.D. 472, 498 (E.D.N.Y. 1968) (indicating that if notice to those persons who are no longer stockholders of defendant Monsanto would create a problem, "it might be necessary to limit the classes to include only those who could be provided with notice from current Monsanto shareholder lists"); *State of Illinois* v. *Harper & Row Publishers*, 301 F.Supp. 484, 494 (N.D. Ill. 1969) (granting class certification, notwithstanding the fact that "the restriction of the classes' scope appears arbitrary"); and *Zachary* v. *Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971); *Dolgow* v. *Anderson*, *supra*, at 500, and *Popkin* v. *Wheelabrator-Frye* [1974-1975 Transfer Binder], CCH Fed. Sec. L. Rep. ¶ 95,068 (S.D.N.Y. 1975) (approving insertion of notice in a regular mailing by a corporate defendant to its stockholders in order to reduce the cost of giving notice to the class).

With respect to the method of giving notice proposed by the plaintiffs, the Court below also noted in its opinion that "under Rule 23(c)(2) the district court could have supervised the form instead, in the exercise of its discretion, to grant the defendants' request with regard to the definition of the class and to require defendants to bear the additional discovery expenses involved in defining the class as sought by them. It is evident from a fair reading of the entire opinion of the District Court that the District Court took into account the "partisan demands" of the defendants in deciding upon the definition of the class and in determining to require the Fund to bear the additional expenses involved in culling out the names of class members from its computer tapes.

None of the cases cited by the defendants dealing with the discovery rules (most of which focus on Rule 33, which, as the Court below indicated, unlike Rule 34, "was not especially tailored to the discovery problems posed by contemporary computer technology," (42a) shows that the District Court abused its discretion in this case in refusing to shift the burden of the expense involved in identifying class members from the Fund to the plaintiffs. These cases do not set forth any hard-and-fast rules with regard to the allocation of discovery expenses. Rather, the cases indicate that the matter is to be determined within the discretion of the District Court based upon the facts and circumstances presented by the particular case. In the instant case, as the Court of Appeals observed, "the order of the district court accommodated the competing interests in a manner which was fair and imaginative." (46a)

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of notice included in one of the Fund's regular mailings, so as to avoid undue prejudice to the Fund," and that "[i]n any event the Fund has already notified its shareholders on many occasions of the pendency of this litigation." See also, *Miller* v. *Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971), where the Court rejected a claim by the defendant that sending a class notice to the shareholders of the defendant who had already been apprised of the litigation in prospectuses and letters sent by the defendant to them would "seriously injure the financial position" of the corporation.

We respectfully submit that the District Court, based upon the record in this case, did not abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes.

We further respectfully submit that this case, which presents a unique set of circumstances that is not likely to recur, does not involve "principles the settlement of which is of importance to the public as distinguished from the parties," nor is there presented here "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp.* v. *Western Well Works, Inc., supra.* Accordingly, review by this Court of the decision below is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defendants' petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1976

No. 77-335

Oppenheimer Fund, Inc., Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy, Jack Nash, Edmund T. Delaney and Emanuel Celler,

Petitioners,

v.

Irving Sanders, Egon Taussig, Michael Shaev and Rita Shaev,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

October 7, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 24(4) of this Court, Petitioners ("defendants") submit this Reply in support of their Petition for a Writ of Certiorari (the "Petition") to the United States Court of Appeals for the Second Circuit,[1] docketed with this Court on September 1, 1977.

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[1] The opinion of the three-judge panel of the Court of Appeals (App. C, p. 11a.) has been reported at 558 F.2d 636, and the subsequent opinion of the Court of Appeals on rehearing en banc (App. E, p. 34a.) has been reported at 558 F.2d 646, since the filing of the Petition.

The question here presented for review is whether, in a class action under Rule 23(b)(3), any of the defendants can be required to bear the substantial expense of identifying and assembling the names and addresses of class members for the purpose of relieving Respondents ("plaintiffs") of that obligation incident to sending the initial class action notice required by Rule 23(c)(2).

As set forth in the Petition (pp. 5, 10, 25), this question arose in connection with plaintiffs' motion for class determination under Rule 23(c)(1). Plaintiffs did not attempt to use the discovery procedures to obtain the class members' names and addresses. The district court below did not purport to act under the Federal discovery rules in making its September 30, 1975 order, which directed the defendant Oppenheimer Fund, Inc. (the "Fund") to bear the costs of class member identification. There has been no compliance or attempt to comply with the procedural requirements of the Federal discovery rules in this case.[2]

Although the record establishes beyond question that the order appealed from did not arise out of a proceeding under the discovery rules, plaintiffs' brief in opposition to certiorari argues as if they had sought class member identification and as if the district court had ordered the Fund to pay the costs thereof under the authority of those rules.[3] Starting from these invalid premises, plaintiffs' brief is devoted to a lengthy and irrelevant discussion of the trial court's discretionary power to allocate *discovery costs* and the scope of appellate review of such non-relevant discretion.[4]

Plaintiffs' attempt to subsume class action notice requirements under the discovery rules should not obscure the three substantial grounds for granting certiorari in the instant case, namely: (1) the decision below directly conflicts with the decision of this Court in *Eisen IV*[5] on the proper incidence of notice costs in maintaining Rule 23(b)(3) class actions, a matter of national importance in view of the substantial burdens class actions place on federal courts; (2) the decision below is in direct conflict with the decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977), on the same question; and (3) in erroneously attempting to negate application of this Court's decision in *Eisen IV,* the decision below will have the effect of improperly authorizing discovery outside the scope permitted by Rule 26(b)(1).

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[2] For this very reason, the United States Court of Appeals for the Third Circuit held that non-party broker-dealers could not be required to pay the costs of class member identification, when plaintiffs there argued for the first time on appeal that such was a cost of discovery allocable in the discretion of the district court. *In re Penn Central Securities Litigation,* No. 76-2139, Slip op. at 13 (3d Cir. August 5, 1977). Indeed, the Third Circuit distinguished the en banc decision of the court below on the erroneous assumption that the procedural requirements of the Federal discovery rules had here been satisfied. *Id.* at 13.

[3] As indicated in the Petition, the discovery rationale has its origins in the en banc majority opinion. (App. E, p. 40a.) The district court appears to have considered the issue of the incidence of class member identification costs as governed by the notice provisions of Rule 23(c)(2). (App. A, pp. 2a, 7a.)

[4] Since it is not material to the Petition, defendants merely note at this time without extensive correction that plaintiffs' "Statement of the Case" is erroneous in a number of significant respects, including the claim that plaintiffs' proposed class redefinition would obviate the need to cull out names and addresses and the claim that defendants opposed such redefinition in their own interests "presumably" because of the limited res judicata effect.

[5] *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) (*"Eisen IV"*), *vacating,* 479 F.2d 1005 (2d Cir. 1973).

I.

Plaintiffs' Contentions Lack Merit on the Issue that the Decision Below Directly Conflicts with the Decision of this Court in *Eisen IV* on a Matter of National Importance.

In *Eisen IV*, this Court decided that the usual rule is that a "plaintiff must pay the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 179. The Petition establishes (pp. 14-21) that the cost of determining the names and addresses of class members to whom the class notice is to be sent is a part of notice costs, and therefore to be borne by plaintiffs. Plaintiffs' brief is wholly unresponsive to the significant conflict between the decision of this Court in *Eisen IV* and the en banc decision below. Indeed, plaintiffs assert that there is no conflict, solely because this Court did not in *Eisen IV explicitly* address the possibility that the Federal discovery rules might be claimed to govern class member identification and the costs thereof. (Brief in Opposition, pp. 23-24.) Plaintiffs' argument assumes that in not expressly negating application of the discovery rules, this Court intended tacitly to authorize their application wherever possible in connection with the giving of notice for class action purposes. There is absolutely no support in the language of the *Eisen IV* opinion for any such interpretation, and plaintiffs refer to none.

Perhaps because of the inherent conflict between the decision of this Court in *Eisen IV* and the en banc majority, plaintiffs endeavor to forestall this Court's review, by stating: "The facts and circumstances in this case are peculiar and not likely to recur." (Brief in Opposition, p. 14.) This present claim of uniqueness is inconsistent with and in striking contrast to the position heretofore taken by the same counsel in an affidavit in support of plaintiffs' petition for rehearing en banc, wherein he stated:

> "Said decision of the Court [the three-judge panel herein] concerns *complex and novel issues of vital importance in the prosecution of class actions* under Rule 23 of the Federal Rules of Civil Procedure, particularly concerning the notice requirement and the allocation of the costs of identification of class members. . . ." (emphasis added)

The issues in this case are not unique. They will arise in any class action in which defendants' records relating to class members (be they stockholders, customers or the like) are stored in a computer, which is ever more likely to eventuate in our increasingly technological society. As stated in the en banc minority opinion below:

> "We expect that until the Supreme Court intervenes this court will be asked to further rule on this issue. The burden is not inconsiderable." (App. E, pp. 54a-55a n.5.)

In reaching this conclusion, the minority noted among other things the ever increasing volume of class actions, from 2,717 filed in federal courts in 1974 to 3,584 filed in 1976, an increase of more than 25%. (Petition, p. 12 n.16.)

The widespread importance of the issue here presented for review is further evidenced by the fact that the Petition and plaintiffs' brief in opposition, which are not intended to comprise a complete presentation of relevant decisional law, cite more than twenty-five recent cases treating the question of which party should bear class identification costs.[4] Contrary to plaintiffs' assertion (Brief in Opposition, pp. 17-18.), some of these cases have required that plaintiffs bear the costs of class member identification pursuant to this Court's decision in *Eisen IV*. *E.g., Popkin* v. *Wheelabrator-Frye, Inc.*, CCH Fed. Sec. Law Rep. ¶95,411 at p. 99,090 (S.D.N.Y. 1976); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 359-60 (E.D. Pa. 1976). The large majority of such cases has treated identification costs as part of the expense of notice and has imposed identification costs on plaintiffs. (Petition, pp. 15-16 n.17.) As indicated in the Petition (p. 16 n.17, ¶2), a few of these cases have attempted to distinguish between identification and notice and have imposed identification costs on defendants. These continuing conflicts and the confusion between and within the Circuits, which will be exacerbated if the decision below is permitted to stand without review by this Court, demonstrate the importance of granting certiorari herein.[7]

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[4] Defendants maintain, moreover, that the decision below has significance far beyond this specific issue and that it will have a

Since the decision below is in conflict with and substantially undercuts this Court's decision in *Eisen IV* on a matter of major importance, it should be reviewed and reversed.

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significant and undesirable effect in numerous civil suits involving discovery, both in and outside the class action context.

[7] On the basis of requests made of defendants' counsel for the briefs filed below and the Petition filed herein, it appears that law reviews and legal commentators regard this case as significant and have taken an active interest in its progress. Doubtless, plaintiffs' counsel has received similar requests.

II.

Plaintiffs' Contentions Lack Merit on the Issue that the Decision Below Directly Conflicts with the Decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation* and Will Cause Confusion in Numerous Class Actions Unless Resolved by this Court.

Plaintiffs argue that the decision below does not conflict with the decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) ("*Nissan Motor*"), on two grounds, both of which lack substance.

The first of plaintiffs' contentions is that in *Nissan Motor* information as to the names and addresses of class members was not contained in computer tapes as in the instant case. This alleged distinction between class members names and addresses contained in computer records and information manually recorded is not merely irrelevant but borders on the frivolous.[8] In *Nissan Motor*, the Fifth Circuit stressed that because the records containing the class members' names and addresses could be "examined as readily by the class representatives as defendants" there were no "peculiar circumstances which would warrant a departure from [the] general rule . . . [that] the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members as well as paying the costs of their individual notice." 552 F.2d at 1102. Here, as in *Nissan Motor,* the records from which a list of the names and addresses can be compiled are fully available to plaintiffs, who can examine the records and extract the information they desire as easily and as effectively as can the defendants. The plaintiffs do not deny this.

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[8] The *Nissan Motor* court did not, either by reference to *Foster* v. *Maryland State Savings and Loan Ass'n*, 1974-2 CCH Trade Cases ¶75,277 (D.D.C. 1974), or in any other way, suggest that it would have ruled differently had the class information been computerized. The *Nissan Motor* court noted that in *Foster* "the class information was *readily available* to the defendant from its computer tapes. . . ." 552 F.2d at 1101 n.16 (emphasis added). The issue here presented arises because the class information is *not* readily available to the instant defendants.

Plaintiffs' second ground for distinguishing *Nissan Motor* lacks a foundation in fact, and is based on the erroneous claim that defendants' opposition to the class redefinition proposed by plaintiffs "necessitated" the expense of class member identification. In fact, the district court had indicated repeatedly that the possible harm to the Fund impelled the court to limit the delivery of notice to class members only. Accordingly, as briefly noted in the Petition (p. 32), the district court's refusal to redefine the class to exclude persons who were not current Fund shareholders but who had made purchases during the relevant period, as sought by plaintiffs, did not affect identification costs, since substantially the same processes would be required to identify from the Fund's list of current shareholders those who purchased shares during the class period. Moreover, the issues of class definition and class member notification are logically and should remain legally distinct.

Plaintiffs, however, offer no explanation whatsoever as to how the decision below possibly can be squared with the unequivocal holding of the Fifth Circuit that, rather than being controlled by the Federal civil discovery rules, identification of class members' names and addresses is part and parcel of plaintiffs' obligation to provide individualized notice pursuant to Rule 23(c)(2), and that, in the usual case, as here, plaintiffs must pay class member identification costs.

The decision below is in conflict with the decision of the Fifth Circuit and involves an important question of Federal law which should be settled by this Court.

III.

Plaintiffs' Contentions Lack Merit on the Issue that the Decision Below Will Have the Effect of Improperly Authorizing Discovery Beyond the Scope Permitted by Rule 26(b)(1).

Even assuming that the court below could consider the discovery rules although they were not at issue in this case in the district court,[10] the determination of the names and addresses of the instant class members in the circumstances here present is beyond the scope of discovery authorized by Rule 26(b)(1).

Plaintiffs' argument misstates that portion of the Petition (pp. 25-27) pertaining to the limitations of permissible discovery imposed by the subject matter relevance test of Rule 26(b)(1). Thus, plaintiffs state that "defendants contend that information as to the names and addresses of class members may not be obtained pursuant to the discovery rules . . . *presumably because [they] relate to class action requirements in the case.*" (Brief in Opposition, p. 20.) (emphasis added) To the contrary, the defendants maintain that the names and addresses are beyond the scope of discovery precisely because they do *not* relate in any way whatsoever to the class action requirements under Rules 23(a) and 23(b) which must be pleaded and proved

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[10] Under such circumstances, the Third Circuit has refused to apply the discovery rules to compel non-party broker-dealers, at their own expense, to effect class member identification. *In re Penn Central Securities Litigation,* No. 76-2139, Slip op. at 13-14 (3d Cir. August 5, 1977).

(such as common questions, numerousness of the class members and the like), nor to the jurisdiction of the court, nor to any existing or anticipated substantive issue in this case. Because this information is not relevant to the "subject matter" of the action as required by the Rule 26(b)(1), it is not discoverable. For this reason, the en banc dissenters admonished the majority that the class members' names and addresses are "sought simply for notification purposes and not discovery in any sense in which that process has ever been defined." [11] (App. E, p. 54a.)

In sharp contrast to material that properly may be obtained through discovery, plaintiffs here do not seek the class members' names and addresses for their informational value or their relevance to the subject matter of the action. Indeed, plaintiffs do not in any real sense wish to obtain any information. What they desire is that the Fund shall pay the substantial costs of programming its transfer agent's computers so as to assure that the class action notices will be properly distributed to the persons that plaintiffs and their counsel are seeking to represent. Under the mantle of discovery, the plaintiffs have attempted to transfer to the defendant Fund responsibility for and the

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[11] Plaintiffs contend that because they were permitted limited discovery of the Fund's transfer agent in connection with the motion to designate this a class action, there is no "logical basis" for not including class member identification under the discovery rules. (Brief in Opposition, p. 22.) This contention is without merit. The discovery authorized below related to the subject matter of the case, i.e., whether the names and addresses of prospective class members could be ascertained through reasonable effort so that notice could be given as required if the action were to be maintaind as a class action as requested in the complaint. Having determined what notice is required by Rule 23, further discovery in this area is not relevant to the subject matter. It is both logical and proper to refuse to extend discovery for the sole purpose of transferring to defendants the responsibility and expense of performing mechanical tasks necessary to comply with notice requirements. Indeed, this was the very position taken by the Fifth Circuit in *Nissan Motor*, 552 F.2d at 1102.

cost of performing one of several mechanical tasks that are a necessary part of providing the individual notice required by Rule 23(c)(2) if plaintiffs are to obtain the benefits of a class action.

Since the decision below evades the result of this Court's decision in *Eisen IV* and will have the effect of improperly enlarging the scope of discovery beyond that authorized by Rule 26(b)(1), it should be reviewed and reversed by this Court.

CONCLUSION

Plaintiffs conclude their brief in opposition (p. 33) by listing three reasons why they claim this Court should not review the decision below:

1. They claim that this case "presents a unique set of circumstances that is not likely to recur." On the contrary, it is not the "circumstances" that are unique but the specious claim of plaintiffs (adopted by the en banc majority) that ascertainment of the names and addresses of the members of the class is not a necessary and integral part of giving the individual notice required by Rule 23 (c)(2), but is somehow a separate matter governed by the discovery rules.

2. Plaintiffs claim that this case does not involve "principles the settlement of which is of importance to the public as distinguished from the parties." On the contrary, the very large and increasing number of class actions filed and pending in United States courts throughout the country (as noted in the dissenting opinion of Circuit Judge Mulligan, App. E, pp. 54a-55a, n.5.) attests to the importance of reviewing the decision of the court below and resolving the controversy and confusion which now

exists with respect to the issues herein and which will be magnified if this Court permits the decision to stand without review.

3. Finally, plaintiffs claim that there is not "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." On the contrary, the Fifth Circuit decision in *Nissan Motor* reaches a conclusion and is based on a principle of law flatly in conflict with the decision of the Second Circuit herein.

Accordingly, the Petition should be granted and, upon review, the decision below should be reversed.

Dated: New York, New York
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In the

Supreme Court of the United States

October Term, 1977

No. 77-335

Oppenheimer Fund, Inc., Oppenheimer Management Corp.,
Oppenheimer & Co., Leon Levy, Jack Nash, Edmund T.
Delaney and Emanuel Celler,

Petitioners,

v.

Irving Sanders, Egon Taussig, Michael Shaev
and Rita Shaev,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 20 F.R. Serv. 2d 1218. (PA-1a).*

The memorandum order of the District Court entered following motions for reargument of its opinion is unreported. (PA-9a).

The opinion of the 3-judge panel of the Second Circuit Court of Appeals is reported at 558 F.2d 636, 21 F.R. Serv. 2d 1213. (PA-11a).

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* "PA" refers to pages in the Appendix to the Petition for a Writ of Certiorari filed with this Court on September 1, 1977.

The subsequent opinion of the Court of Appeals on rehearing en banc is reported at 558 F.2d 646, 23 F.R. Serv. 2d 676. (PA-34a).

Jurisdiction Of The Court

The judgment of the Second Circuit Court of Appeals en banc was entered on June 22, 1977. The Petition for a Writ of Certiorari was filed on September 1, 1977, and the Petition was granted on October 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Rules Involved

The following rules are involved in the determination of this case, and are set forth in full text in the Appendix attached to this Brief:

Fed Rule Civ. Proc. 23, 28 U.S.C.

Fed. Rule Civ. Proc. 26(b)(1), 28 U.S.C.

Fed. Rule Civ. Proc. 33(c), 28 U.S.C.

Fed. Rule Civ. Proc. 34, 28 U.S.C.

Question Presented

Whether in a class action maintained under Fed. Rule Civ. Proc. 23(b)(3), any of the defendants can be required to bear the substantial expense of identifying and assembling the names and addresses of class members for the purpose of relieving plaintiffs of that obligation incident to sending the initial class action notice required by Fed. Rule Civ. Proc. 23(c)(2).

Statement Of The Case

This is a proceeding to review a judgment of the United States Court of Appeals for the Second Circuit, en banc, that would require petitioner Oppenheimer Fund, Inc. (the "Fund"), at substantial expense, to ascertain the names and addresses of some 121,000 class members, in order to enable respondents ("plaintiffs") to send the notice required by Fed. Rule Civ. Proc. 23(c)(2).[1] The en banc judgment reversed the judgment of a 3-judge panel of the Second Circuit and affirmed an order of the United States District Court for the Southern District of New York that had required the Fund to pay this expense.

1. *Background*

Plaintiffs seek to maintain this action on behalf of a class of 121,000 current and former shareholder accounts of the Fund acquiring shares between March 28, 1968 and April 24, 1970 (the "relevant period"). (PA-4a, 7a, 10a). Petitioners ("defendants") are the Fund, an open-end investment company registered under the Investment Company Act of 1940 ("1940 Act"), 15 U.S.C. §80a-1 *et seq.;* Oppenheimer Management Corporation (the "Manager"), the investment adviser to the Fund; Oppenheimer & Co., a New York Stock Exchange member firm which owned during the relevant period all the voting shares of the

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[1] The Federal Rules of Civil Procedure will be referred to in this brief as "Rule . . .".

Manager; and directors of the Fund during the relevant period.[2] (A-59, PA-37a).

The Fund sells its shares to the public at a price that reflects the current value of the Fund's assets, plus a service charge. (PA-37a). A shareholder desiring to liquidate his shares sells them to the Fund, which redeems them for a sum representing the proportion of the Fund's net assets represented by the shares. (A-122, PA-37a). As of March 30, 1973, when plaintiffs served their class action motion under Rule 23(c)(1), the Fund had approximately 171,000 shareholders (PA-38a), and net assets of approximately $523,000,000. (A-122).

The fees of the Manager for performing its advisory and administrative functions pursuant to its agreement with the Fund are computed as a percentage of the net asset value of the Fund's portfolio.[3] (PA-37a).

The Fund's shareholder accounts are of two kinds. As of August 31, 1973, Fund shares were directly owned by approximately 86,000 investors. (A-208). In addition, Fund shares were owned beneficially by approximately 85,000 planholders through Oppenheimer Systematic Capital Accumulation Program ("OSCAP"), an investment company of the unit investment trust type, registered under the 1940 Act. (A-122, 208). Fund shares held by OSCAP are credited to accounts of planholders so that each planholder owns a specified but undivided interest in the total Fund shares held in OSCAP's name. (PA-2a).

2. *Nature Of The Action*

The actions herein were brought against defendants by (1) Irving Sanders, on March 26, 1969; (2) Egon Taussig, on May 12, 1969; and (3) Michael and Rita Shaev, on June 18, 1969. (A-123). At the commencement of their actions, Sanders owned 209 Fund shares (through OSCAP); Taussig owned 2,369; and the Shaevs owned 45.[4] (Fractions of shares are omitted.) (A-123). The actions were consolidated on December 17, 1969. (PA-2a).

Plaintiffs essentially allege that during the relevant period defendants other than the Fund (the "non-Fund defendants") caused the Fund to overvalue restricted securities in the Fund's portfolio.[5] (A-112-113). The alleged overvaluation purportedly caused (1) plaintiffs and members of the class to pay inflated prices when acquiring Fund shares (PA-37a), (2) the Fund to pay inflated prices when redeeming its shares and (3) the Fund to overpay the Manager to the extent that the Manager's fees depended on the value of the Fund's portfolio. (A-112-13, PA-3a). Plaintiffs further allege that the non-Fund defendants caused the Fund to fail to make adequate disclosure in prospectuses and periodic reports of the acquisition of restricted securities and of the methods of their valuation. (PA-3a). The alleged conduct purportedly constituted violations of Sections 12(2) and 17 of the Securities Act of 1933, 15 U.S.C. §§77*l*(2) and 77q; Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 issued under the 1934 Act, 17 C.F.R. §240.10b-5; Sections 22, 30 and 37 of the 1940 Act, 15 U.S.C. §§80a-22, 80a-29 and 80a-36, and rules issued under the 1940 Act; and fiduciary obligations under state law.

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[2] Petitioning directors are: Leon Levy and Jack Nash, senior partners in Oppenheimer & Co. and officers of the Fund; Edmund T. Delaney, Esq., former partner in the firm of Townsend & Lewis, formerly counsel to the Fund; and former Congressman Emanuel Celler. (A-128).

Other directors named as defendants are Murray Graham, Eric Hauser, Joseph M. McDaniel, Jr. and Sidney M. Robbins. These individuals have not appeared in the action.

[3] In accordance with Section 15 of the 1940 Act, 15 U.S.C. § 80a-15, the contract between the Fund and the Manager is renewed and reviewed annually by the Board of Directors of the Fund.

[4] At the commencement of the actions, the net asset values per share were approximately $8.49, $9.11 and $8.19 respectively, as computed from Exhibit 1 of Defendants' Answers to Plaintiffs' Interrogatories. (Record, Document 30.)

[5] Restricted securities, which are usually acquired from an issuer, are securities whose public sale or distribution is restricted under the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, until registered or until an exemption from registration becomes available. Section 2(a)(41) of the 1940 Act, 15 U.S.C. § 80a-2(41), provides that securities for which market quotations are available shall be valued at market value; and other securities, such as restricted securities, shall be valued at fair value as determined by the board of directors in good faith.

Plaintiffs seek to recover damages from the non-Fund defendants only, in the amount that plaintiffs and members of the class allegedly overpaid the Fund because of the alleged overvaluation of securities. (A-112-113). Since plaintiffs have asserted no claims against the Fund (PA-17a), the Fund is a nominal defendant only, without a direct interest in the outcome of the class claims. If the class recovers, however, the Fund may be liable to the non-Fund defendants on their cross-claims to the extent that the Fund has benefited from any overpayments. (A-67, 89).

Plaintiffs have also asserted derivative claims on behalf of the Fund against the non-Fund defendants to recover from them allegedly excessive fees that the Fund paid to the Manager (A-20, 52; PA-4a), and allegedly excessive amounts paid by the Fund in redeeming shares during the relevant period. (A-29, 53). The derivative claims are not related to class notice costs, the issue here on review. (PA-18a).

In their answers, defendants have denied the material allegations of the complaint and have asserted various affirmative defenses. The answers allege, among other things, that the value of the restricted securities never

exceeded 10% of the value of the Fund's assets (A-61, 75); that the restricted securities were at all times carried at their fair value as determined in good faith by the Board of Directors of the Fund pursuant to Section 2(a)(41) of the 1940 Act (A-64, 76); and that the Fund fairly, adequately and timely disclosed its investments in restricted securities. (A-61, 75, 84-5). The non-Fund defendants have alleged set-offs against plaintiffs and the Fund to the extent that the alleged overvaluation of Fund securities benefited them. (A-66-67; 89-90).

On March 30, 1973, some four years after the complaints were filed, plaintiffs moved pursuant to Rule 23(c)(1) for an order determining that their action was maintainable as a class action. (A-111, 120). The class they sought to represent consisted of all persons who bought Fund shares between March 28, 1968 and April 24, 1970, both directly and through OSCAP.[6] (A-142). The members of the class designated by plaintiffs numbered approximately 121,000. (A-130, PA-13a). As of the date of the motion for class determination, only about 103,000 class members still owned Fund shares. (A-130, 145, PA-5a).

Plaintiffs' attorneys claim that, on the average, each class member sustained aggregate damages of approximately $15. (Plaintiffs' Affidavit ¶3, Record, Document No. 93). Defendants contend that even if the restricted securities were consistently overvalued by as much as 10%,[7] the average shareholder account would have been damaged in the aggregate by no more than $2 to $24, depending on the date of purchase of the shares. (PA-4a).

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[6] Purchasers included those who during the relevant period first purchased Fund shares and existing Fund shareholders who made additional purchases. (A-191).

[7] As previously stated, defendants deny that there was any overvaluation.

3. *Costs Of Notice*

In connection with their class determination motion, plaintiffs on July 18, 1973, took the deposition of the Fund's independent transfer agent, Investment Company Services Corporation, to obtain information concerning the methods and costs of determining the names and addresses of class members. (A-163, PA-20a). The deposition revealed that the transfer agent maintained separate magnetic computer tapes for direct Fund shareholders and OSCAP planholders. (A-167). The names and addresses of these shareholders were maintained on a current basis only, so that no existing tapes would yield a printout of purchasers of Fund shares during the relevant period. (PA-13a). The class members could be identified only by devising procedures and programs to scan tapes relating to shareholder lists and transactions during the relevant period; and separate procedures and programs would be required for identifying direct shareholders and OSCAP planholders.[8] (A-166).

The cost of identifying the class members involved the cost of (1) keypunching, including the cost of IBM cards, machine time, and operator's time; (2) preparing the necessary programs; (3) computer time, including time for testing programs (A-197); (4) computer operator's time (A-188); and (5) supervisory time. (A-183-186, 195-197). The transfer agent estimated in 1973 that the total cost would be in excess of $16,000 (Schedule A to Memo-

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[8] Identifying the relevant purchasers who were direct shareholders entails, in addition to programming and other procedures for scanning tapes, keypunching IBM cards on the basis of transactions reported in daily journals and placing the information on the cards onto magnetic tape. (A-172-174). With respect to programming, four programs are required to identify direct shareholders (A-175, 181-182) and another four to identify OSCAP planholders acquiring their interests during the relevant period. (A-192-194).

randum of the Oppenheimer Defendants on Class Motion and Further Proceedings, Record, Document No. 79), an amount which doubtless will be higher at the present time.

Besides identification costs, notification of the class entails printing and handling costs of approximately $5,000.[9] (A-146). Plaintiffs' counsel has stated that plaintiffs would pay $5,000 for printing and handling costs (A-146), but not the more than $16,000 then estimated for identification costs, stating:

> "Thus, the total cost of giving notice to the class if it were necessary to ascertain the names and addresses of the members of the class at this time and to send the notices solely to these individuals would be in excess of $20,000. . . . [P]laintiffs are not in a position to agree to pay the costs of notice in this amount . . . ." (A-148-149; A-143).

Accordingly, plaintiffs have taken no steps to ascertain the names and addresses of members of the class, although the requisite daily journals, magnetic tapes, and computer machinery have been fully available to them. (PA-51a-52a).

4. *Plaintiffs' Attempt To Alter Their Original Class Definition*

While plaintiffs' class action motion was pending in the District Court, *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (*"Eisen III"*), was decided, holding that the costs of notifying class members ordinarily were payable by plaintiffs. Plaintiffs then moved to change the definition of the class they purported to represent, solely for the purpose of avoiding the expense of class member identification. (A-142, PA-38a). Specifically, plaintiffs proposed amending the definition of the class to eliminate persons who were not Fund shareholders or planholders at the time notice was to be mailed—i.e., to exclude from the class a group consisting of some 18,000 persons who had acquired Fund shares during the relevant period. (PA-20a). Plaintiffs simultaneously sought to have the Court direct that the class notice be given by insertion of the notice in a regular Fund mailing to all its current shareholders, whether or not members of the class. (A-145, PA-7a).

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[9] This sum does not include postage. (A-146). Plaintiffs have suggested that after defendants have identified class members, the class notice to those who are still Fund shareholders should be part of the Fund's next regular mailing to its shareholders, thus eliminating separate postage expense for mailing to the majority (as of 1973) of class members.

Defendants opposed plaintiffs' proposal because the mailing to all Fund shareholders would have unnecessarily risked grave harm to the Fund. (A-129). Under the aegis of a court-approved notice, the proposal would have caused delivery of plaintiffs' claims, with their injurious allegations concerning defendants, to some 68,000 current shareholder accounts that were not class members. (PA-20a). At the time defendants opposed the proposal, stock market prices had declined severely[10] causing a substantial loss of investor confidence in the stock market, which was reflected in the mutual fund industry, so that net redemptions exceeded gross sales. (A-131). The proposed notice could reasonably be expected to lower further investor confidence and consequently to trigger further substantial redemptions. Thus Robert Galli, Secretary of the Fund

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[10] Some experts pronounced the market's decline "its sharpest decline since 1932." Richard J. Stinson, *Financial World*, January 29, 1975, p. 19. *Business Week*, January 27, 1975, at p. 50 reported:

> "The Dow-Jones average has lost more than one-third of its value in the past two years and the Value Line Composite Index—which includes some 1,550 issues and is more indicative of how the average investor has probably fared—has been more than halved since early 1973."

and Administrative Vice President of the Manager, stated in an affidavit dated May 23, 1973:

> "A broadcast mailing of a class action notice to all of the current shareholders of the Fund, even though a very large number of them have no direct interest in the suit, will undoubtedly cause shareholders to redeem their shares; and it is possible that such a notice may precipitate a substantial demand for redemption, which could well have some of the unfortunate effects of a run on a bank. In order to meet redemption calls, the Fund's liquid assets are consumed, thereby preventing the Fund from taking advantage of investment opportunities and, in addition, the Fund will be required to make forced sales of securities in a very poor market—all to the detriment of the Fund and its shareholders." (A-131).

Plaintiffs' proposal would have effected savings in notice costs only if both elements (class reduction and broadcast mailing) were permitted. Only together would these elements eliminate the need for and the cost of class member identification. Merely reducing the number of class members would not have accomplished this. Special programming and other costs would still have been necessary to identify the 103,000 persons constituting the class if notice were to be given only to them.

5. *Decision And Order Of The District Court*

The District Court in a decision dated May 15, 1975, held this action maintainable as a class action. (PA-5a). It designated as class members the approximately 121,000 shareholder accounts that had acquired shares of the Fund between March 15, 1968 (a date later corrected to March 28, 1968) and April 24, 1970—the class plaintiffs had originally sought to represent. (A-142). It rejected defendants' proposal to limit the class by shortening the relevant purchase period.[11] (PA-6a-8a). The Court also rejected plaintiffs' double-barreled class-reduction and broadcast-mailing proposal on the ground that it was arbitrary and improper. Omitting from the class, as plaintiffs wanted, those persons who had bought Fund shares during the class period but had sold them afterwards, would, said the Court,

> "cut out . . . approximately 18,000 persons who logically belong in the class." (PA-7a).

The Court added:

> "I can simply say that in my view, *plaintiffs' proposal would involve an arbitrary reduction in the class.* If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares." (Emphasis supplied). (PA-5a-6a).

Since redefinition of the class was found objectionable, it was unnecessary for the Court to rule on the broadcast-mailing element of plaintiffs' proposal. Nevertheless, the Court acknowledged defendants' objection to a mailing that "would result in the notice being sent to numbers of shareholders who are not members of the class." (PA-8a).

The Court also indicated that defendants opposed plaintiffs' proposal "*presumably* because it would limit the res judicata effect of this action." (Emphasis supplied). (PA-5a). It did not attempt to harmonize this hypothesis

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[11] Defendants sought to have the class reduced by limiting it to purchasers of Fund shares during the one-year period from March 15, 1968 to April 25, 1969 instead of the two-year period from March 28, 1968 to April 24, 1970 originally proposed by plaintiffs and ultimately approved by the District Court. (PA-6a).

with the fact that defendants had sought to have the class defined even more narrowly than plaintiffs had.

The Court's attempted solution was to require plaintiffs to send individual notice to class members alone, and to require the Fund

> "to be responsible for whatever work and expense is involved in providing the list of class members to plaintiff." (PA-2a).

The Court cited no authority for allocating the costs of identifying class members to the Fund, although it acknowledged that identification costs were "connected with the giving of notice." (PA-2a). It advanced two reasons for its decision: first, that "the expense [of providing the list of class members] is relatively modest" (PA-6a); and second, that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (PA-6a).

Both plaintiffs and defendants moved for reargument of the District Court's decision. On September 30, 1975, the Court entered a memorandum order making clear that the starting date of the relevant period was March 28, 1968, and providing, in material part, that the Fund would bear "the cost of culling out the list of class members" and that plaintiffs would mail class notices at their own expense only to class members. (PA-10a).[12]

6. *Decision Of The Three-Judge Panel Of The Second Circuit*

Defendants appealed to the Second Circuit Court of Appeals the District Court's decision that the Fund had to bear the substantial expense of identifying class members.[13] Defendants also appealed the decision that the action was maintainable as a class action, on the ground that that action was unmanageable, but defendants do not seek review of that issue by this Court.

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[12] The memorandum order enabled plaintiffs to minimize the expense of mailing by requiring the Fund to send notices as part of its regular mailings to class members who were still Fund shareholders, but not to shareholders who were not class members.

A majority of the Second Circuit Court of Appeals panel (Judges Mulligan and Palmieri;[14] Judge Hays, dissenting) reversed the District Court to the extent that it had imposed on the Fund the costs of identifying class members. It held that these identification costs were part of the costs of notifying the class:

> "[W]e are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes." (PA-21a-22a).

Under *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) ("*Eisen IV*"), in the Panel's view, plaintiffs had to bear such costs:

> "[T]he cost of such notice must be borne in the first instance by plaintiff. . . . In the usual case, defendants may not be compelled in a class action to provide financial support for a class action against themselves." (PA-15a).

The Panel rejected as an inappropriate basis for decision the District Court's finding that the identification expenses were relatively modest. Under *Eisen IV*, consideration of the relative abilities of plaintiffs and defendants

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[13] Jurisdiction was predicated on 29 U.S.C. § 1291 and the collateral order doctrine. See *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

[14] Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

to bear notice costs was irrelevant to the determination of who must pay them:

> "[The District Court] found the expense was 'relatively modest,' apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen IV*." (PA-19a-20a).

It further found that defendants' opposition to plaintiffs' class reduction-broadcast mailing proposal had not increased the costs of notice. The District Court had rejected plaintiffs' proposal because the class as redefined would have been improper:

> "The district court . . . [found] that these persons [to be excluded from the class as redefined] could not be excluded because to do so 'would involve an arbitrary reduction in the class.' The class as originally defined [by plaintiffs] was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the cost. The two issues are distinct. . . . [The] identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants." (PA-20a-21a).

The Panel noted that the District Court's decision mooted plaintiffs' request to mail notices to non-class members; therefore the District Court had not considered the validity of defendants' objections to plaintiffs' broadcast-mailing request. (PA-21a).

The Panel nevertheless deemed defendants' objections to notifying non-class members well-founded. While recognizing that Fund shareholders may well have been "advised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports" (PA-21a), the Panel found the impact of that kind of notice far less substantial than that of an official notice of a class action:

> "[W]e think that notice of that type [i.e. in proxies, prospectuses and annual reports]—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the plaintiffs, giving a detailed explanation of the claims and without a denal of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct . . . ." (PA-21a).[15]

The Panel also dismissed plaintiffs' argument that the costs of identification were discovery costs allocable within the discretion of the District Court; it held they were notice costs and therefore not allocable. (PA-23a). It likewise rejected the view that any fiduciary duties which may have existed among plaintiffs and defendants justified imposing notice costs on any defendants. (PA-17a-19a).

Even if the identification costs were deemed discovery costs instead of notice costs, the Panel concluded plaintiffs would nevertheless have to bear them under Rule 33(c):

> "Under this rule [Rule 33(c)], a party will not be required to perform ~~burdensome~~ extraction of information from sources that are available to the party seeking discovery." (PA-22a).

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[15] **The District Court specifically found that a Fund prospectus had deemed the suit meritless in the opinion of management. (PA-6a).**

Specifically rejected was Judge Hays' dissenting view that Rule 34 exclusively governed identification of class members. The Panel stated that Rule 34 dealt with the "production" of data compilations—not "sorting" and "analysis of data" (PA-23a, n.7) and added:

> "The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If 'sophisticated electronic manipulation and analysis' become necessary, 'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.' 8 C. Wright and A. Miller, Federal Practice & Procedure §2218 at 659 (1970)." (PA-23a, n.7).

7. *Decision Of The Second Circuit On Rehearing En Banc*

On plaintiffs' application, the Second Circuit Court of Appeals reconsidered en banc the issue of who should bear the costs of identifying class members. With three judges dissenting, the Second Circuit reversed the 3-judge Panel decision and affirmed the District Court decision which provided that the Fund at its own expense must extract from its computer records and furnish to plaintiffs the names and addresses of class members.

Although this issue arose under plaintiffs' Rule 23 motion for class determination and not under any discovery rule, the Circuit majority stated that "it hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery. . . ." (PA-40a).

The majority said that the costs of class member identification were costs of notice but held these costs should be allocated to defendants under Rule 34, a discovery rule which defendants contend does not apply to new programming at their expense in order to satisfy plaintiffs' obligations under Rule 23. Said the majority:

> "In *Eisen,* the plaintiff's effort to impose the costs of notice upon the defendants failed '[i]n the absence of any support under Rule 23.' Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the fund, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records." (PA-40a).

The majority held the names and addresses of class members discoverable because they were relevant to a "potential issue"—an issue that might arise in the future—of whether or not proper notice had been sent to class members:

> "The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are 'relevant to the subject matter' of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as *a potential issue in all such litigation* whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. See *Appleton Electric Co.* v. *Advance United Expressways,* 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.,* 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972)." (Emphasis supplied). (PA-40a).

The majority said that identification costs could not be charged to plaintiffs under Rule 33(c), which defendants contend is applicable if any discovery rule is applicable. That Rule provides that where information is to be derived from available business records and the cost of

derivation is substantially the same for both parties, the responding party can satisfy discovery requirements by making available the pertinent existing records for inspection or copying. In the majority's opinion, Rule 33(c) does not govern where computerized data is involved:

> "It may well be that where ordinary business records are concerned Rule 33 would generally require that the discovering party bear the expense of data compilation unless for special reason the compilation can be undertaken only by the respondent. However, Rule 33(c) cannot derogate from the general command of Rule 34 that the respondent to a demand for computerized information produce a 'reasonably usable' print-out of data contained in a computer's memory. Unlike Rule 34, Rule 33 was not especially tailored to the discovery problems posed by contemporary computer technology." (PA-42a).

The majority took no position on the proper cost allocation if Rule 33(c) were found applicable, however:

> "We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable." (PA-42a, n.1).

Having found that the District Court had discretion under the discovery rules to allocate the costs of class member identification, the majority concluded that the District Court had not abused it by ordering the costs to be borne by the Fund. First, the majority reasoned that the Fund should have foreseen that its use of computers might well make it more difficult to furnish information in possible future litigation, and, therefore, the Fund should bear the expense of programming:

> "Computers, which in general make information more readily available, may occasionally make information more difficult to discover. Even where a party adapts his computer software strictly in accordance with legit-

imate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used. If the information demanded is such as the respondent might reasonably have expected to be required to make available for public examination or for use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming. . . . It is scarcely unreasonable, moreover, to demand of a respondent that he employ his computer resources to provide discoverable information of a relatively simple nature where, as here, the respondent makes extensive use of computers in the operation of its business." (PA-43a-45a).

Second, said the majority, the allocation was fair in light of the substantial size of the Fund's business:

> "Although compliance with the district court's order entails an expenditure by the fund in excess of $16,000 . . . [c]onsidering the extent of the fund's business . . . the burden of compliance with the Rule 34 discovery demand is not excessive." (PA-44a).

Third, the majority found that the opposition of defendants to plaintiffs' class reduction-broadcast mailing proposal justified the allocation. The majority identified defendants' reasons for opposition as: (1) the class reduction would limit the res judicata impact of the action; and (2) the mailing of class notices to non-class members would prejudice the Fund. (PA-45a-46a). Agreeing that the latter reason was "undoubtedly entitled to some weight" (PA-46a), it nevertheless said non-class members who would have received notice already knew of the litigation and the District Court could have "supervised the form of notice . . . so as to avoid undue prejudice to the fund." (PA-46a, n.4).

Judge Mulligan, joined by Judges Van Graafeiland and Meskill,[16] filed a cogent dissent which characterized the majority opinion as "conceptually unsound", "as a matter of logic . . . bewildering", "unprecedented", and "flouting" the decision of this Court in *Eisen IV*. (PA-49a, 52a, 56a). The dissenters would reverse the portion of the District Court's order imposing identification costs on the Fund for the reasons advanced by the Panel. They noted in part:

> "The majority forces the defendant to subsidize the suit against it, a result which is aberrant to our jurisprudence and to the extent that it depends upon the premise that the defendant has greater financial resources is further in conflict with *Eisen IV*. In sum, we believe Judge Palmieri's opinion for the panel properly disposed of the issue now before us en banc . . . ." (PA-48a).

> ". . . [W]e base our dissent on the ground that the costs involved here are unquestionably costs of notification which must be borne by the plaintiffs under Rule 23 and therefore are clearly within the rule of *Eisen IV*. The strained attempt to convert notification into Rule 34 discovery is conceptually unsound and unprecedented. We therefore adhere to the well-reasoned opinion of Judge Palmieri for the panel." (PA-56a).

Summary Of Argument

1. By imposing on defendant Fund the cost of identifying members of the class, the Second Circuit has nullified in material respects the recent decision of the Supreme Court in *Eisen IV* that plaintiffs must pay notice costs under Rule 23 if they wish to maintain their action as a class action. Identification of class members is an integral

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[16] Senior District Judge Palmieri, author of the 3-judge Panel decision, was ineligible to participate in the en banc proceedings. Also not participating were Circuit Judges Lumbard and Friendly.

component of the notice required to be given and whose costs plaintiffs are required to bear. The circumstances of this case, including defendants' proper opposition to plaintiffs' attempt to require a mailing to all present Fund shareholders, whether or not class members, do not warrant any change in the application of the rule of *Eisen IV*. A contrary result can only serve to increase the burdens on courts and parties of litigation which is largely undesirable and usually beneficial to few of those concerned other than the attorneys involved.

2. Under the guise of the federal discovery rules, the Second Circuit has improperly shifted to the Fund the costs of notice under Rule 23, even though the question of identification of class members did not arise under any discovery rule, and even though this Court in *Eisen IV* condemned resort to procedures outside Rule 23 to decide matters arising under that Rule. Plaintiffs do not seek and do not require information or knowledge; all they seek is to shift the burden of expense. For this reason alone, the identification of class members is outside the scope of permissible discovery. But even if the matter were discoverable, the cost would be chargeable to plaintiffs as provided in Rule 33(c), which is applicable where, as here, access is afforded plaintiffs to sources from which the required information must be extracted. Rule 34, relied on by the Second Circuit, is not applicable where, as here, a printout from existing material would not produce the requisite information. Despite intimations to the contrary in the Second Circuit's decision, the discovery rules do not and were not intended to shift costs not otherwise allocable to a party merely because in the regular course of business it (or its transfer agent) finds it necessary or desirable to keep business records on computers.

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

POINT I

The Second Circuit Majority, By Imposing On The Fund The Cost Of Identifying The Members Of The Class, Has Nullified In Material Respects The Recent Decision Of The Supreme Court In *Eisen IV* That Plaintiffs Must Bear The Costs Of Notice Under Rule 23(c)(2).

In *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) (*"Eisen IV"*), this Court ruled that in the usual class action, plaintiffs must bear the cost of the notice required to be sent to class members pursuant to Rule 23(c)(2); and if plaintiffs cannot or will not bear such cost, the class action cannot be maintained. The Second Circuit in this case has emasculated the rule of *Eisen IV*.

A. The Cost of Ascertaining The Names And Addresses Of Members Of The Class Is Part Of The Cost Of Notice Required By Rule 23(c)(2).

Where, as here, a class action is maintained under Rule 23(b)(3), subdivision (2) of Rule 23(c) requires that class members who are identifiable through reasonable effort be given individual notice of the pendency of the action, in terms as follows:

> "(2) In any class action maintained under subdivision (b)(3) [of Rule 23], the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not

> request exclusion may, if he desires, enter an appearance through his counsel."

In *Eisen IV,* this Court held that under Rule 23(c)(2) individual notice to identifiable class members was mandatory:

> "[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." 417 U.S. at 176.

Eisen IV also held that it is plaintiff who must bear the cost of this notice:

> "[T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 179.

Indeed, considerable support exists for the view that requiring defendants to bear notice costs would be so unfair as to border on a denial of due process. This view rests on considerations applicable here, that defendants would be unlikely to recover the costs of notice from plaintiffs if defendants should prevail, and that it would be unfair to force defendants to make such an expenditure before their liability has been established.

Thus in *Berland* v. *Mack,* 48 F.R.D. 121, 132 (S.D.N.Y. 1969), Judge Mansfield declared:

> "To give a single member of a class who asserts a claim of doubtful merit the power to trigger such a substantial expenditure of corporate funds [i.e., to pay notice costs] . . . smacks of confiscation. Should the corporate defendant in such a suit prevail on the merits after laying out the initial expense of notice to the class, it would in most cases find it impossible to obtain reimbursement."

See also Note, "Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement," 29 Maryland L. Rev. 139, 156-7 (1969) ("The unfairness in subjecting a defendant, *whose liability has not yet been established,* to the burden of giving notice . . . might . . . constitute a denial of due process." [Emphasis in text]); Comment, 5 Loyola Univ. (Chicago) L.J. 264, 280 (1974) ("A defendant who . . . is required to pay [the costs of giving notice] and prevails on the merits but cannot be repaid has, in effect, suffered a money judgment without judgment having been entered against him.").[17]

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[17] Similarly, in dissenting below, Judge Mulligan declared (558 F.2d at 655; PA-55a):

> "The majority is not totally insensitive to the obvious inequity of requiring the defendant to finance the class action brought against it. It suggests that if the plaintiffs ultimately lose discretionary costs 'might' be assessed against them. But this is unrealistic. The plaintiffs have consistently maintained that they cannot afford to pay the $16,580 costs entailed. Their average stake in the litigation is in the range of $2 to $24. The prospect of the defendant obtaining reimbursement is dim indeed. The further suggestion that the costs may be recouped from counsel to the plaintiffs is admitted only as a possibility if the suit is found to be frivolous. If it is simply unsuccessful on the merits there is no hope at all of reimbursement. On the other hand, if the plaintiff class is successful there is no question that the prevailing parties will be entitled to costs, Fed.R.Civ.P. 54(a). Cost transference at this stage of the litigation therefore is hardly justified by the highly doubtful recoupment possibilities envisaged by the majority in derogation of the normal principles reiterated in *Eisen IV.*"

In *Eisen III,* Judge Hays, author of the instant majority opinion, joined in rejecting imposition of notice costs on the *Eisen* defendants solely because the defendants would not be reimbursed for them if they prevailed. Said Judge Hays in *Eisen III* (479 F.2d at 1020):

> "I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 percent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure."

The notice required to be given under Rule 23(c)(2) necessarily involves a number of components, including at least the following: (1) ascertaining the names of class members, (2) learning their addresses, (3) preparing the form of notice, (4) printing the notice, (5) stuffing the notices in envelopes, (6) marking the envelopes with the names and addresses of class members, (7) putting postage on the envelopes, and (8) mailing them. If any of these components is eliminated, such as identification of class members, it is not possible to give the required notice under Rule 23(c)(2).

The majority of relevant cases expressly or impliedly treat the process of identifying class members as an integral part of the process of notifying class members. For instance, *In re Memorex Security Cases*, 61 F.R.D. 88, 103 (N.D. Cal. 1973) noted that the "method of notice" comprised "identification of . . . class members . . . and . . . mail . . . used to notify" them.[18]

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[18] *Accord: In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 359-60 (E.D. Pa. 1976); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 25, 43 (S.D. Iowa 1972) (cost of notice includes cost of preparing list of class members); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 494 (N.D. Ill. 1969) (preparation of mailing list of class members is a task associated with informing absent parties); *City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH *Trade Cases* ¶ 60,812 at p. 68,514 (S.D.N.Y. 1976); *B&B Investment Club* v. *Kleinert's, Inc.*, 1973-4 CCH *Fed. Sec. L. Rep.* ¶ 94,451 at p. 95,572-73 (E.D. Pa. 1974); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 290 (S.D.N.Y. 1971); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F.Supp. 710, 724-5 (S.D.N.Y. 1970); *Popkin* v. *Wheelabrator-Frye, Inc.*, 1975-6 CCH *Fed. Sec. L. Rep.* ¶ 95,411 (S.D.N.Y. 1976); *Herbst* v. *Able*, 47 F.R.D. 11, 17-19 (S.D.N.Y. 1969); *In re U.S. Financial Securities Litigation*, 69 F.R.D. 24, 46-7 (S.D. Cal. 1975) (plaintiffs required to exert reasonable efforts to identify class members); *Berland* v. *Mack*, 48 F.R.D. 121, 133 (S.D.N.Y. 1969) (Mansfield, J.) (portion of "cost of furnishing" notice includes expense of identifying class members); *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F.Supp. 673, 684 (N.D. Ind. 1966).

The language of Rule 23(c)(2) itself indicates that identification constitutes part of notice. The Rule requires the "best notice practicable under the circumstances"; and it defines as part of this notice "individual notice to all members who can be *identified* through reasonable effort." (Emphasis added.) As Judge Mulligan said in the dissent below:

> "This language [from Rule 23(c)(2)] would clearly indicate that the draftsmen of the rule made no distinction between the identification of the class and the notification of individual members. Notification posits identification which is an inseparable part of the process." 558 F.2d at 652; PA-50a.

Since identification of the names and addresses of class members is an essential component of the notice process, no logical or factual basis exists for treating the costs of identification as outside the rules relating to notice costs. The 3-judge Panel below noted:

> "Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. . . . However, we are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes." 558 F.2d at 642; PA-21a-22a.

So too, the dissenters from the Second Circuit en banc decision, said:

> "The majority now creates in effect a bicephalous rule which is anomalous. The cost of printing, stuffing and postage of the notice *must* be borne by the plaintiffs but the cost of obtaining the names and addresses to

put on the envelopes *may* be thrust upon the defendants in the discretion of the trial bench. . . . We cannot appreciate how it can be reasonably held that the expenses incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice." (Emphasis in text). 558 F.2d at 652; PA-49a.

Directly in point is the recent Fifth Circuit case, *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977), a class action maintained under Rule 23(b)(3).[19] The court there, in contrast to the Second Circuit, required plaintiffs to bear the costs of identifying class members, stating (at p. 1102):

> "The time and expense of gathering their names and addresses [i.e. of the class members] is a necessary predicate to providing each with notice of the action's pendency without which the action may not proceed. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. at 179, ... [I]dentification of absentee class members' names and addresses is part and parcel of rule 23(c)(2)'s mandate that the class members receive 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'"

Since identification costs are part of the notice costs that plaintiffs must bear in order to obtain the benefits of a class

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[19] Before the decisions in *Eisen III and Eisen IV*, a number of courts allocated all or a portion of identification costs to defendants under the erroneous view that this was in their discretion, but what is noteworthy is that they treated the costs of identification of class members as part of the costs of notice. *E.g., Berland* v. *Mack,* 48 F.R.D. 121, 133 (S.D.N.Y. 1969); *Lamb* v. *United Security Life Co.,* 59 F.R.D. 25, 42 (S.D. Iowa 1972).

action, plaintiffs' ability or willingness to bear these costs is irrelevant. As this Court stated in *Eisen IV*:

> "There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176.

Accord: Herbst v. *International Telephone & Telegraph Corp.,* 65 F.R.D. 13, 20 n. 17 (D. Conn. 1973), *aff'd,* 495 F.2d 1308 (2d Cir. 1974) ("The mere fact that a plaintiff cannot bear the cost of notice does not indicate that the defendant must pick up this bill. The desire to implement the class action device effectively must always be balanced by the fear that excessive concern for the financial interests of the plaintiff may result in the imposition of unwarranted expenses upon the defendant.")

Notwithstanding this Court's directions in *Eisen IV*, the Second Circuit majority, in imposing identification costs on the Fund, in fact considered the relative ability of the parties to pay,[20] stating:

> "Although compliance with the district court's order entails an expenditure by the fund in excess of $16,000, we cannot say the burden thus imposed is unreasonable in light of . . . the extent and character of the fund's business operations." 558 F.2d at 650; PA-44a.

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[20] The dissenters below observed that it is inherent in almost every class action that defendants are wealthier than plaintiffs:

> "The deeper pocket is invariably in the trousers of the defendant. This consideration . . . was expressly rejected in *Eisen IV* where the Court stated, 'There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs'." 558 F.2d at 654; PA-53a.

B. Defendants' Opposition To Plaintiffs' Proposal Entailing A Mailing To Non-Class Members Did Not Justify Imposing On The Fund The Costs Of Identifying Class Members.

The Second Circuit majority in justifying the decision of the District Court referred to defendants' opposition to plaintiffs' two-pronged proposal to reduce the size of the class and to mail the class notice to all current Fund shareholders, whether or not class members. The District Court did not reject plaintiffs' proposal, however, because of any unreasonable or partisan demands by defendants, assuming *arguendo* such demands would justify imposing the identification costs of notice on the Fund. Rather, plaintiffs' proposal was rejected because it was arbitrary and unfair.[21] Said the District Court:

> "[P]laintiffs' proposal would involve *an arbitrary reduction in the class.* If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares." 20 F.R. Serv.2d 1218, 1221; PA-5a-6a. (Emphasis supplied).

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[21] Even if defendants had opposed plaintiffs' proposal because it required certification of an improper class, that should not justify imposing identification costs on defendants. Judge Mulligan, for the dissent, noted:

> "We cannot agree that by opposing an improper class a defendant thus becomes liable for any increased costs of notification. The class cannot become proper only if the defendant bears the costs of notifying the members. If this is to be the law the opportunities for abuse become obvious." 558 F.2d at 654; PA-54a.

Such a rule would in effect reward plaintiffs who propose improper classes that, for whatever reason, incite opposition from defendants.

The 3-judge Panel properly observed defendants' interests were unrelated to the District Court's rejection of plaintiffs' proposal, stating:

> "The district court . . . [held] that these persons could not be excluded because to do so 'would involve an arbitrary reduction in the class.' The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct." 558 F.2d at 641; PA-20a.

Indeed, the public interest may in fact be well-served by the rejection of plaintiffs' proposal to reduce the class. Having a larger class may minimize the burdens on the judicial system by reducing possible "repetitive litigation of related subject matter." See Note, "Allocation of Initial Notice Costs Under Federal Rule 23(c)(2)," 1973 Illinois Law Forum 723 (1973). A larger class may also reduce "judicial paperwork by eliminating the use of the same documents in multiple suits"; and help "maintain judicial consistency by ensuring that different judgments do not occur in apparently similar cases." *Id.* at p. 724.

The Second Circuit's reference to the "presumed" benefits to the defendants of the res judicata effects disregards the fact that defendants themselves sought an even narrower class period than plaintiffs had proposed—namely, a cut-off date at April 25, 1969, instead of April 24, 1970. (PA-6a). Moreover, excluding from the class some 18,000 former Fund shareholders is not likely to result in harassment of the Fund, for if the Fund prevails in the class action, the likelihood of subsequent claims will be slight in view of the precedential impact of the prior decision. See Dam, "Class Action Notice: Who Needs It?," *The*

Supreme Court Review—1974, 97, 120 (1975) ("To the extent that class actions are the result of a lawyer's entrepreneurship, second actions need hardly be feared, for what entrepreneur would invest time and money in a venture already demonstrated to be profitless?"); *Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 760 (3rd Cir. 1974), *cert. denied* 419 U.S. 855.

Rather, defendants opposed plaintiffs' proposal essentially because it entailed a mailing to some 68,000 *non-class members* that would have unnecessarily risked harm to the Fund. Uncontradicted affidavits (A-121 *et seq.*; A-129 *et seq.*) established that in the declining market that then prevailed, the mutual fund industry suffered from a loss of investor confidence, and net redemptions were exceeding sales of mutual fund shares. See *supra* fn. 10 at p. 10. In those circumstances, it was reasonable to conclude that a formal notice sent out under the aegis of the court and charging Fund directors with derelictions of duty might well stimulate a wave of redemptions by non-class members. Such redemptions would consume the Fund's liquid assets, deprive it of investment opportunities, and require forced sales of parts of its portfolio. (A-129 *et seq.*). The 3-judge Panel found "[t]here is evidence in the record to substantiate the concern." 558 F.2d at 641; PA-21a.

The Second Circuit majority arbitrarily dismissed this risk to the Fund, noting that the Fund's management had already informed all Fund shareholders of the action, for example, in prospectuses. They ignored the obvious difference in impact between an official class notice and incidental references in documents largely devoted to other matters, e.g., prospectuses, proxy statements and annual reports, which many shareholders ordinarily read only cursorily, if at all.

The importance of the action announced by a class notice and the allegations summarized therein may be inflated, moreover, by the fact that the notice is an official document.[22] Thus, the court in *Dolgow* v. *Anderson,* 43 F.R.D. 472, 501 (E.D.N.Y. 1968), cautioned against any unnecessary publicity in connection with class actions, stating:

> "[T]he notice provisions themselves may prove harmful to defendants since the attendant publicity and *its official source may inflate the apparent importance of the action.* [citations omitted.] So much of the stock market depends upon faith and reputation that the court should be reluctant to lend its weight to any unnecessary publicity in connection with a pending lawsuit." (Emphasis supplied).

See also *Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 761-2 (3d Cir. 1974) (recognizing "the additional settlement leverage which results from the disruption or injury which may occur to a defendant's business relationships regardless of the merits of the claim by the mere sending of the notice."). The 3-judge Panel below also differentiated between the "milder impact" of a few paragraphs in a prospectus and the effect of an official notice. 558 F.2d at 641, PA-21a. Similarly, *Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1099 (5th Cir. 1977), rejected a proposed notification of non-class members, where the class consisted of original retail purchasers of Datsun automobiles and plaintiffs sought to give notice to all present owners.

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[22] "The [Rule 23] (c) (2) notice is the court's notice rather than any party's. The notice should be signed by the judge or by the clerk of the court. . . ." *Manual of Complex Litigation* § 1.45, West Publ. Co., (1977), p. 46.

C. The Relationship Among The Parties To This Action Justifies No Exception To The Rule In *Eisen IV* That Plaintiffs Must Bear The Cost Of Notifying The Class.

Eisen IV created no exceptions to the rule that plaintiffs must bear the cost of notifying the class under Rule 23(c)(2). It did refer, however, without elucidation, to the possibility of a different rule where a fiduciary duty pre-existed between plaintiffs and defendants, such as in a shareholder derivative suit. Said this Court at 417 U.S. 178:

> "The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit.[15]" (footnote in text)

In footnote 15, the Court stated:

> "15. See, e.g., *Dolgow* v. *Anderson*, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968). *We, of course, express no opinion of the proper allocation of the cost of notice in such cases.*" (Emphasis supplied).

Judge Hays' opinion for the en banc court below was silent and presumably abandoned his position in his dissent to the 3-judge Panel decision, that fiduciary relationships among plaintiffs and defendants justified imposing identification costs on the Fund.[23] Should such an exception exist, however, it would not be applicable here. First, plaintiffs' class action is not analogous in any material respect to a derivative action. A derivative action is brought exclusively for the benefit of the corporation; a class action, like plaintiffs', is brought to benefit the class members and not the Fund. Thus the Fund and plaintiffs share no common interest that may arguably render the imposition of notice costs on the Fund fair. The 3-judge Panel stated:

> **"The Supreme Court . . . described *Eisen IV* as a case where 'the relationship between the parties is truly adversary.' 417 U.S. at 178. . . . Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests closely aligned with the plaintiff and indeed would be the beneficiary of any recovery." 558 F.2d at 640; PA-17a.**

That plaintiffs do not assert class claims against the Fund indicates that the Fund is not truly a party defendant with respect to those claims. This alone renders *Eisen IV's* statement concerning cases involving fiduciary duties inapposite. *Eisen IV* referred to situations where a fiduciary duty pre-existed between "the plaintiff and defendant." 417 U.S. at 178. The Fund, however, as the 3-judge Panel explained, is not a defendant in the class action:

> **"No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrongdoing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here." 558 F.2d at 640; PA-17a-18a.**

Further, the test advanced by *Dolgow* v. *Anderson*, 43 F.R.D. 472, *supra*, for shifting notice costs to a fiduciary

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[23] The dissent to the Second Circuit majority decision noted:
"Plaintiffs had argued before the panel that they were in a fiduciary position with the defendants and that therefore the possible loophole in *Eisen IV* applied. Judge Hays, dissenting in the panel opinion, espoused that position but it has been understandably abandoned in the en banc majority opinion." 558 F.2d at 652, n.2; PA-49a, n.2.

is no longer workable. *Dolgow* found a shifting of costs fair where various conditions were met, including a preliminary hearing on the merits followed by findings of a prima facie breach of fiduciary duty and that the defendant fiduciary was better able to bear the costs than plaintiff. 43 F.R.D. 472, 499.

In *Eisen IV*, however, this Court expressly found improper the holding of a preliminary hearing on the merits. Thus a prima facie breach of fiduciary duty, determined after such a hearing, may no longer be established. *Eisen IV*, 417 U.S. at 177-78. Also, *Eisen IV* prohibited considering the relative abilities of plaintiffs and defendants to pay for notice under Rule 23(c)(2); therefore, the fiduciary's greater ability to pay for notice is irrelevant. 417 U.S. at 176.

The impropriety of permitting allegations of breach of fiduciary duty to justify a shifting of notice costs is evident. By making such allegations, regardless how unfounded, plaintiffs could circumvent their obligation to pay for notice under Rule 23(c)(2). Moreover, the shifting of such costs may well be unfair to shareholders that have not joined the class. As *Berland* v. *Mack*, 48 F.R.D. 121, 131-2 (S.D.N.Y. 1969), observed:

> "We do not agree that the corporate defendant should be required initially to pay for the notice merely because charges of breach of fiduciary duty are at issue. . . . . To give a single member of a class who asserts a claim of doubtful merit the power to trigger such a substantial expenditure of corporate funds, without any assurance of joinder on the part of other class members, smacks of confiscation. . . . We doubt that most stockholders expressly or impliedly consent to such a use of corporate funds for vindication of an issue as to fiduciary duty merely because it is raised by one of them."

D. The Second Circuit's Decision Will Further Encourage And Stimulate Vexatious And Burdensome Litigation.

The unfortunate effect of the Second Circuit's en banc decision, if it is permitted to stand, will be to increase the availability of and thus encourage class actions under Rule 23(b)(3) by relieving plaintiffs of class member identification costs. Class actions have heavily burdened an already overworked federal judiciary. By and large, these actions have served to reward class action attorneys rather than to provide any substantial benefits to class members. Their impact has been to bludgeon defendants into settling claims, often without much regard to the merits, in order to avoid loss of executive time, enormous litigation expenses and ruinous recoveries. Thus, *Eisen III*, 479 F.2d at 1018-9 stated:

> "Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may ever be to compensate the individual members of the class, a champion steps forth. . . . [T]he huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim."

While the Advisory Committee's Note, 39 F.R.D. 69, 102 (1966), states that the purpose of Rule 23(b)(3) was to achieve "economies of time, effort, and expense," these goals have to a large extent not been achieved. Rule 23 has instead generated lawsuits that without the Rule would not have been brought. See Comment, 16 Boston College Industrial and Commercial Law Review 254, 263 (1975); Pollock, "Class Actions Reconsidered: Theory and

Practice Under Amended Rule 23," 28 Bus. Lawyer 741, 742 (April 1973); Simon, "Class Actions—Useful Tool or Engine of Destruction", 55 F.R.D. 375, 377 (1972). Moreover, when class suits are brought, they invariably tend "to be very time consuming." Comment, 16 Boston College Industrial and Commercial Law Review 254, 263 (1975).

The number of class actions pending in the federal district courts has been growing,[24] thereby adding to the burdens imposed by the general increase in the civil caseload of the federal courts.[25] Accommodation of class actions by the courts diverts scarce resources from other cases. Thus one commentator has observed:

> "Aside from his concerns about the burden of the case itself, a judge faced with an *Eisen* type of class action might be concerned with the impact of the case on his ability to deal adequately with the other cases on his docket. A federal district court, unlike the Supreme Court with its certiorari power, has little ability to control its workload. If it is already working at maximum efficiency, it can adjust to further cases only by reducing the quality of its work or by allowing its backlog to lengthen. In a time of already crowded dockets, the lengthened backlog may have the consequence of discouraging civil actions that would otherwise be brought and of rendering the criminal justice system less just and effective." Dam, "Class Action Notice: Who Needs It?", *The Supreme Court Review—1974* 97 at 105-6 (1975).

Accordingly, serious doubts have been expressed whether limited judicial resources are best used to vindicate small wrongs sustained by a multitude of claimants. *Eisen III*, 479 F.2d at 1020, n. 28, quoting Judge Henry Friendly's *Federal Jurisdiction: A General View*, p. 120, declared:

> " 'Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims.' "

See also *Hackett* v. *General Host Corp.*, 455 F.2d 618, 626 (3d Cir. 1972) ("Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight.").

Class actions may well be of little financial importance to class members whom they purportedly benefit. Plaintiffs' counsel, for instance, here acknowledges that the claims of members of plaintiffs' class average only about $15 each. After deduction of counsel fees and other expenses of litigation, possible recoveries by class members would be substantially less. See Simon, "Class Actions—Useful Tool or Engine of Destruction," 55 F.R.D. 375, 378:

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[24] In 1972, only 3,148 class actions were pending in the federal district courts. Administrative Office of the United States Courts, *1972 Annual Report of the Director for the Twelve Month Period Ending June 30, 1972*, p. 189. In 1974, when *Eisen IV* was decided, 4,680 were pending; in 1977, there were 6,281 pending. Administrative Office of the United States Courts, *1977 Annual Report of the Director for the Twelve Month Period Ending June 30, 1977 ("1977 Annual Report")*, p. 121. Despite the decision of this Court in *Eisen IV* imposing notice costs on plaintiffs, the number of pending class actions has risen since 1974. For increases in class action filings in the Southern District of New York, see the dissent to the Second Circuit majority opinion, 558 F.2d at 654-5, n.5; PA-55a, n.5.

[25] The number of pending civil cases per authorized district court judgeship has increased from 232 at the end of fiscal 1970 to 386 at the end of fiscal 1977. *1977 Annual Report* at p. 79.

> "In a litigated class action, the nontaxable costs to the class members of preparing and proving a claim, including responding to discovery, will sometimes exceed the recovery."

Further, past experience shows that many class members will never even bother to collect their recovery. See Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?" 70 F.R.D. 199, 206 (1976):

> "Typically, the hundreds of thousands or millions who are named in these cases have never had an interest in enforcing any claim, disregard or are baffled by notices that purport to make them members of the class—if any notice ever is received—and in most cases even fail to respond when settlements on their behalf have been made and monies are available for distribution."

See also Simon, "Class Actions—Useful Tool or Engine of Destruction", 55 F.R.D. 375, 379 ("Even after a settlement, where class members are notified that they can share in the recovery merely by filing a simple proof of claim, only 10% to 15% bother to do so".).[26]

Viewed realistically, the only certain beneficiaries of class actions, if they succeed, may well be plaintiffs' attorneys. As Judge Weinfeld observed in *Free World Foreign*

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[26] Most class members are conscripts in the litigation:

> "Thanks to the negative option procedure and to conscription technique, they [i.e., attorneys for class action plaintiffs] may be able to acquire an instant clientele of thousands—perhaps millions—merely because their new clients did not request exclusion, even though they never received the notice or understood it and even though their real desire is to have nothing to do with the matter." Pollock, "Class Actions Reconsidered: Theory and Practice Under Amended Rule 23," 28 Bus. Lawyer 741, 743 (April 1973).

Cars, Inc. v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972):

> "[I]t is not idle to observe that class actions, which have proliferated tremendously since the advent of the current Rule—indeed beyond the expectations of its sponsors—threaten to engulf the courts; that substantial questions have been raised whether the Rule, intended to benefit the small consumer or investor who otherwise would have no means of redress, has really achieved its promise, or rather *whether it has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees.*" (Emphasis supplied.).

Similarly, Judge Henry Friendly observed the following concerning class actions:

> "The benefit to any individual plaintiff often is minimal, considerably less than the cost of ascertaining his identity, establishing his damages, and preparing and mailing a check for the few dollars to which he is entitled. . . . While the benefits to the individual class member are usually miniscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled. Generally this is for a figure constituting a small fraction of the amount claimed but large enough to yield compensation to the plaintiffs' lawyers which seems inordinate even in the days of high legal fees." H. Friendly, *Federal Jurisdiction: A General View*, Columbia Univ. Press, New York, 1973, p. 119-120.

See also *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 237-8 (9th Cir. 1974) (concurring opinion) ("The real bonanza in a case like this, if it is won, will go to counsel. . . . I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys.")

While providing little benefit to class members, class actions have been extremely damaging to defendants. The mere possibility of becoming liable for enormous damages has led defendants to settle, often regardless of the merits of the case. Simon, *supra,* 55 F.R.D. at 389-390, noted:

> "The potential exposure in broad class actions frequently exceeds the net worth of the defendants, and corporate management naturally tends to seek insurance against whatever slight chance of success plaintiffs may have. Such insurance is usually available for a comparatively modest premium in the form of a settlement with the attorney who initiated the litigation and who purports to speak for vast numbers of people who have not retained him."

To the risk of liability must be added the "huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders." *Eisen III,* 479 F.2d at 1019. See also Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?" 70 F.R.D. 199, 202-203 (recognizing the abuse of discovery inherent in complex litigation, such as antitrust suits, in which defendants may be required to produce millions of documents); 4 J. Moore, *Federal Practice* ¶ 26.84 at p. 26-636 (2d ed. 1976).

Professor Milton Handler in "The Shift from Substantive to Procedural Innovation in Antitrust Suits—the Twenty-Third Annual Antitrust Review," 71 Col. L. Rev. 1, 9 (1971), has aptly termed the impact of class actions on defendants

> "a form of *legalized blackmail.* If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace." (Emphasis supplied).

It is not unusual for those who defend the desirability of class actions to justify the imposition of these substantial litigation expenses and settlement costs on the ground that defendants are usually large businesses that can afford them. In fact, however, it is the whole society which must ultimately bear them. Sometimes society does so directly by paying higher prices for goods and services. See Kirkham, *supra,* 70 F.R.D. at 204 (". . . litigation is the new growth industry, adding millions of dollars to the cost of producing consumer goods and services."). Always society pays indirectly through the unusually heavy burdens, often out of proportion to the benefits realized, which class actions impose on the judicial system.

In *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* 421 U.S. 240 (1975), this Court would not condone a change in policy that would shift the burden of litigation expenses incurred for legal fees even where the plaintiffs acted as private attorneys general and vindicated important rights for the entire public. Here where plaintiffs are not acting in a quasi-public character and there has been no final or even preliminary determination of the merits of their claims, there is no reason to change existing policy and shift Rule 23 expenses.

Neither considerations of social policy nor the facts and circumstances of the instant case warrant undercutting this Court's decision in *Eisen IV* that plaintiffs are required to pay the costs of notice under Rule 23 if they wish to obtain the benefits of maintaining their action as a class action. Accordingly, the judgment of the Second Circuit en banc should be reversed.

POINT II

The Cost Of Identifying Class Members For Purposes Of Giving Notice Required Under Rule 23(c)(2) May Not Be Shifted To Defendants Under The Guise Of The Federal Discovery Rules.

The Second Circuit's attempt to avoid the proper application of *Eisen IV* to this case rests upon a misreading and misapplication of the federal discovery rules. The Second Circuit's rationale is summed up in its statement at (558 F.2d at 648; PA-40a) as follows:

> "In *Eisen,* the plaintiff's effort to impose the costs of notice upon the defendants failed '[i]n the absence of any support under Rule 23.' Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the fund, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records."

The attempt to analogize the costs of notice to the costs of discovery was previously before this Court in *Eisen IV* and was rejected by it, as was observed in the dissenting opinion below:

> "We note that in *Eisen IV* the petitioner's brief argued, 'Subjecting Respondents to the cost of notice does not differ in effect from requiring parties to make substantial expenditures to comply with discovery orders. . . .' Petitioner's brief at 40-41. The same argument was advanced on oral argument before the Supreme Court, 42 U.S.L.W. 3493. *The Court did not even dignify this argument by any discussion in its opinion."* (Emphasis supplied). 558 F.2d at 653, n.4; PA-52a, n.4.

A. Obtaining The Names And Addresses Of Class Members And The Costs Thereof Are Matters Which Arose In Proceedings Under Rule 23, Not In Connection With Discovery Proceedings, And Must Therefore Be Decided Under Rule 23 And Not Under The Discovery Rules.

The questions of class member identification and the costs thereof did not arise in this case in connection with any discovery proceeding. They arose on plaintiffs' motion for class determination under Rule 23, as is clear from the decision of the District Court, which states:

> *"Plaintiffs have moved for class action treatment* of a part of these consolidated cases, which consist of both class and derivative claims. *Certain problems have been raised,* mainly as to the definition of the class and *as to who is to bear certain expenses connected with the giving of notice."* (Emphasis supplied). 20 F.R. Serv. 2d 1218, 1219; PA-1a-2a.

Plaintiffs have never sought to invoke the discovery rules to ascertain the identities of class members, and the issue whether the names and addresses of class members are discoverable under federal discovery rules has never been in this case. For this very reason, the Third Circuit has recently held that non-party broker-dealers could not be required to pay the costs of class member identification, when plaintiffs there argued for the first time on appeal that these were costs of discovery allocable within the discretion of the District Court. See *In re Penn Central*

Securities Litigation, 560 F.2d 1138 (3d Cir. 1977), declaring (at 1145):

> "[T]here was in this case no compliance with the procedural requirements of Rule 34(b). The district court did not purport to act under Rule 34(b) in making its August 22, 1975 *ex parte* order.
>
> Since Rule 34 was not involved in this case in the district court we have no occasion to address the issue . . . of whether Rule 34 discovery is a method for avoiding some of the impact of the Supreme Court's holding in *Eisen IV* that the class representative must bear the initial cost of notice." [27]

Furthermore, the identification of class members is to be determined exclusively under Rule 23 rather than under the discovery rules. As was stated in the recent decision of the Fifth Circuit, *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1102 (5th Cir. 1977), which reached a conclusion contrary to the Second Circuit here:

> "[I]t becomes strikingly clear that rather than being controlled by the federal civil discovery rules, identification of absentee class members' names and addresses is part and parcel of rule 23(c)(2)'s mandate that the class members receive 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'"

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[27] The Third Circuit in *Penn Central* distinguished the Second Circuit's en banc decision in the instant case on the erroneous assumption that the procedural requirements of the federal discovery rules had here been satisfied.

This follows from the Supreme Court's decision in *Eisen IV* that questions concerning the allocation of the costs of Rule 23 notice were to be determined under Rule 23 only.[28] Thus *Eisen IV* declared at 417 U.S. 178-9:

> *"In the absence of any support under Rule 23,* petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class . . . as part of the ordinary burden of financing his own suit." (Emphasis supplied).

Specifically rejected by this Court was an attempt to allocate notice costs derived from a procedure imported from proceedings applicable to preliminary injunctions: viz., an inquiry into the merits of the action. Using this procedure in *Eisen,* the District Court had decided plaintiffs were likely to recover and therefore imposed the bulk of the costs of notice on defendants. The Supreme Court held any such imported procedure impermissible because not authorized by Rule 23, saying (417 U.S. at 177):

> *"We find nothing in either the language or history of Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit . . . ." (Emphasis supplied).

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[28] Resort to federal discovery rules is certainly unnecessary to enable the court to enter orders concerning notice. The power that it enjoys under Rule 23(d) is sufficient:

> "Rule 23(d) vests the district court, as manager of the class action, with the appropriate authority to enter whatever orders are necessary to the conduct of the action . . . and resort to the discovery rules for the authority to enter such orders is unnecessary." *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1102 (5th Cir. 1977).

See also *Peoples* v. *Wainwright,* 325 F.Supp. 402, 403 (M.D. Fla. 1971).

Similarly, nothing in the language or history of Rule 23 authorizes resort to proceedings under the discovery rules to allocate notice costs. Procedures which are designed for other purposes may not be used under Rule 23 for the purpose of shifting the costs of notice.

B. The Identification Of Class Members Does Not Fall Within The Scope Of Information Discoverable Under The Federal Discovery Rules.

The scope of all federal civil discovery is limited by the provisions of Rule 26(b)(1), whether sought pursuant to Rule 33, Rule 34. or any other discovery provision. 4 J. Moore, *Federal Practice* ¶ 26.56 [1] at p. 26-115 (2d ed. 1976). Rule 26 was intended to and by its terms does limit discovery to the acquisition of information, and then only if the information is relevant to the subject matter of the action. In relevant part, Rule 26 provides:

> "(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action. . . . It is not ground for objection that *the information sought* will be inadmissible at trial if *the information sought* appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis supplied).

It is to be observed that while the introductory sentence of subdivision (b) of Rule 26 authorizes courts to further "limit" discovery, they are not authorized to expand the scope of discovery.

By implication, as well as by its terms, Rule 26 provides that discovery may not be used for purposes other than obtaining information and knowledge relevant to the subject matter of the litigation. See *Hickman* v. *Taylor,* 329 U.S. 495, 507 (1947):

> "Mutual *knowledge* of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." (Emphasis supplied).

Where, as here, it is not information or knowledge which is sought, the discovery rules are completely inapplicable, and resort to them to evade payment of the expenses imposed by Rule 23 is an abuse of their purpose.

Here, plaintiffs do not seek any information that is relevant to the subject matter of the action or that is likely to lead to relevant evidence. What they seek is to have the Fund pay for the transfer agent's services leading to the preparation of properly-addressed envelopes so that plaintiffs may meet their own notice obligations under Rule 23. Whether plaintiffs ever see the names and addresses is completely irrelevant to their purpose. Thus without any request for a list of current shareholders, plaintiffs sought to have the Fund mail the notice to all current shareholders. Under the mantle of discovery—but not for the purposes of discovery—the Second Circuit majority would permit plaintiffs to transfer to the Fund responsibility for, and the cost of, performing one of several mechanical tasks that are a necessary part of providing the individual notice required by Rule 23 if plaintiffs are to obtain the benefits of a class action. As Judge Mulligan stated for the dissenters (558 F.2d at 651-2; PA-48a):

> "[P]laintiffs . . . admittedly are only seeking the list of names and addresses of the potential plaintiff class

> in order to notify them of the pending action. . . . Since the only purpose of obtaining the required information is to notify the class as mandated by Rule 23, *Eisen IV* compels the conclusion that the cost of such notification be borne initially, at least, by the plaintiffs."

The Second Circuit majority tried to establish that the names and addresses of class members were in some way relevant to the subject matter of the action by devising a counterfeit issue. Observing that individual notice must be sent to class members, the Court reached the remarkable non sequitur: *"Eisen* raises a *potential* issue in all such litigation whether the required notice has properly been sent", and therefore the names and addresses of class members would be "essential to the resolution of that issue." (Emphasis supplied). 558 F.2d at 648; PA-40a.

Such abstract theorizing about an issue which is not now and has never been in this case is at best metaphysical and specious. Since this "potential" issue is sheer speculation, it is difficult indeed to conceive how it could have "ineluctably propelled" the Court below to its conclusion. As the dissent observed: "This is an exercise in sophistry and not syllogistic reasoning". 558 F.2d at 653; PA-51a. Certainly this potention "issue" would not be raised by the Fund, whose agent was furnishing the names and addresses of class members, nor by plaintiffs whose concern is to avoid expense.[29] This conjectural "issue" is too remote

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[29] The dissent below recognized the remoteness of the issue of proper notice, stating:

> "The plaintiffs have never sought discovery relief under Rule 34. In the memoranda submitted by the plaintiffs to Judge Griesa prior to his opinion below there is no mention of Rule 34. . . .
>
> No party here, certainly not the plaintiffs, is seeking 'discovery' as a method of determining whether notice has 'prop-

to warrant application of discovery rules in order to justify shifting costs to defendants for a task which is required to satisfy the mechanics of Rule 23(c)(2). Matters so remote are not within the scope of discovery. See *In re Fontaine,* 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975):

> "While the standard of relevancy is a liberal one, it is not so liberal as to allow a party 'to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.' "

See also *Hickman* v. *Taylor,* 329 U.S. 495, 508 (1947) (discovery not permitted where inquiry "touches upon the irrelevant").

The cases the Second Circuit majority relied on to support its views about the discoverability of the names and addresses of all class members entirely fail to do so. For example, *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974), involved no action under the discovery rules. The court there ordered defendant motor carriers to prepare lists of class members to facilitate notification in order to penalize the carriers. The carriers had obstructed identification of the class members *after* they had been held liable for refunds to class members by the Interstate Commerce Commission and the district court. This punitive rationale is inapplicable here since there has been no obstruction whatsoever of iden-

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> erly' been sent. Plaintiffs are not anticipating potential issues and seeking discovery to maintain a position. They were avowedly and quite simply seeking the list to notify the class under Rule 23. Should any issue arise as to 'proper notification', e.g., was the list complete, was the notice appropriate, was the postage adequate, presumably it would be raised by a putative member of the class but not *in limine* by the plaintiffs who are required to notify and pay the costs of notification under *Eisen IV.*" 558 F.2d at 653; PA-51a-52a.

tification; nor has there been any determination on the merits establishing defendants' liability.[30]

Similarly, the Second Circuit's reliance on *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. den.* 405 U.S. 921 (1972), is misplaced. The issue there was whether properly notified absentee class members were subject to sanctions for failing to comply with defendants' demands for discovery—not discovery of class members' identities.

Accordingly, even if the question of identification of class members had arisen properly under the discovery rules, the identification of class members would be outside the scope of permissible discovery, and therefore the discovery rules cannot justify imposing the costs of identification on the Fund.

The burdens imposed on courts and litigants in class actions have been alluded to in Point I, at pp. 37-43, *supra*. Those burdens arise in part because of ever more liberal interpretation of the discovery rules taken in conjunction with notice pleading. Where relevancy to an ill-defined subject matter is the test, discovery may proceed for years at great expense to the litigants, clogging court calendars and ill-serving the repute of the judicial system. Serious concern over the abuses of the federal discovery rules was expressed at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference"), which was held in 1976 and was jointly sponsored by the Judicial Conference of the

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[30] See Note, "Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement," 29 Maryland L.Rev. 139, 156-7 (1969) ("[C]onsiderations of unfairness that arise where a requirement of notice is placed upon a perhaps blameless defendant *before liability is established* are absent where a consideration of the merits of the case reveals that the defendant has acted unlawfully to the injury of many."). (Emphasis in text.).

United States, the Conference of Chief Justices, and the American Bar Association. 70 F.R.D. 79 *et seq.* See especially Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?", 70 F.R.D. 199, at 202-07 (1976); Simon H. Rifkind, "Are We Asking Too Much of Our Courts?", 70 F.R.D. 96, at 107 (1976). The Pound Conference led to creation by the American Bar Association of a special Ad Hoc Committee on Abuse of Discovery, which confirmed that discovery devices have been overused and misused. See "Opening Statement" by Paul R. Connolly, Chairman of ABA Section of Litigation in 3 *Litigation* (The Journal of the Section of Litigation, American Bar Association) at p. 1-2 (Summer 1977), which among other things criticizes the "prevailing cant" of "full discovery".

In the circumstances here present, there is nothing that warrants any further extension of the discovery rules beyond the scope now permissible under Rule 26(b).

C. If The Discovery Rules Are Applicable, The Identities Of Class Members Would Only Be Discoverable Under Rule 33(c) At Plaintiffs' Expense, Not Under Rule 34.

Even assuming *arguendo* that the names and addresses of class members are discoverable for the purpose of notice under Rule 23, the cost of obtaining them nevertheless must be paid by plaintiffs pursuant to Rule 33(c). The Second Circuit majority erred in finding them discoverable under Rule 34.

Rule 34 is limited to the production for inspection and copying of designated documents and tangible things. It provides in relevant part:

> "(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making

the request . . . to inspect and copy, *any designated documents* (*including* writings, drawings, graphs, charts, photographs, phono-records, and other *data compilations from which information can be obtained,* translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters *within the scope of Rule 26(b)* and which are in the possession, custody or control of the party upon whom the request is served . . . ." (Emphasis supplied).

In finding the names and addresses discoverable under Rule 34, the Second Circuit majority emphasized the 1970 Amendment to the Rule, which defined documents to include: "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form", and the Advisory Committee Note on the Amendment, 48 F.R.D. 459 at 527.[31] Neither the Amendment nor the Advisory Committee Note, however, goes beyond requiring production of materials already in existence. No evidence indicates that the Amendment was intended to permit imposing on the responding party the burdens of time and expense in devising computer programs to search out and combine data from several sources so as to produce new information of interest to the discovering party.

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[31] The Advisory Committee Note provides in relevant part:

"The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data."

Accordingly, a list of the names and addresses of class members comparable to that involved in the instant case is not discoverable under Rule 34. No such list exists on any magnetic tape in defendants' possession. While a printout can be made of all present shareholders, no printout can be made of the names and addresses of class members until, among other things, new programs are devised so that the computer can search the requisite tapes. It is well-established that Rule 34 is inapplicable to require the production of material that does not yet exist and must first be created. See *e.g.,* 4A J. Moore, *Federal Practice* ¶ 34.05[1] at p. 34-32 (2d ed. 1975); 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2210, p. 625, West Publ. Co. (1970); 7 *Cyc. Fed. Proc.* § 25.535, page 463, Callaghan & Company (1971). *Soetaert* v. *Kansas City Coca Cola Bottling Co.,* 16 F.R.D. 1, 2-3 (W.D. Mo. 1954) thus declared:

> "Rule 34 cannot be used to require the adverse party to prepare or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence . . . . I cannot order produced something not shown to exist."

The redefinition of the word "documents" in the 1970 Amendment merely clarified the scope of Rule 34; it did not change it. *United States* v. *Davey,* 543 F.2d 996, 999 (2d Cir. 1976).

The 3-judge Panel properly recognized the inapplicability of Rule 34 to require that defendants start to compile a list of class members that does not exist, stating:

> "This rule [Rule 34] addresses itself to the *production* of data compilations for inspection or copying, not to the sorting or analysis of the data . . . . The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different

one from the production for inspection and copying with which Rule 34 is concerned. If 'sophisticated electronic manipulation and analysis' become necessary, 'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.' 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970)." (Emphasis in text). 558 F.2d at 642; n. 7; PA-23a, n. 7.

A contrary view would radically alter the impact of Rule 34, with the most serious consequences for all litigants who may consequently be required to shoulder burdens that properly belong on the party seeking information. No vast imaginative powers are required to foresee that just as litigants may now be required to produce millions of documents in antitrust actions,[32] they would soon be subject to harassing requirements to prepare elaborate, expensive programs to search for computerized data. Still appropriate is the warning given in *Eisen III,* 479 F.2d 1005, 1013, with reference to Rule 23, admonishing against

> "disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure. . . . *It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions,* including oppressions by those whose intentions may be above reproach." [33] (Emphasis supplied).

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[32] See Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?", 70 F.R.D. 199, 203 (1976).

[33] Footnote 13 at this point in *Eisen III* points out:

"13. . . . The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists.

Certainly the draftsmen of Rule 23 had no intention of diluting procedural safeguards for class action defendants. Thus Professor Benjamin Kaplan, who was Reporter to the Advisory Committee on Civil Rules when Rule 23 was amended, stated:

> "The object [of Rule 23] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result *without undue dilution of procedural safeguards* for members of the class *or for the opposing party.*" (Emphasis supplied). Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)," 81 Harv.L.Rev. 356, 390 (1967).

Even if the names and addresses of class members are discoverable, which defendants deny, they would properly be discoverable only under Rule 33(c); and under that Rule, plaintiffs would be required to bear the expense of obtaining them.

Rule 33(c), which deals with interrogatories, provides in relevant part:

> "*Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or *from a compilation, abstract or summary based thereon,* and the burden of deriving or ascertaining the answer is substantially the same for the party serving the

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Justice Brandeis observed that 'in the development of our liberty insistence upon procedural regularity has been a large factor.' (Burdeau v. McDowell, 256 U.S. 465, 477 . . . (1921) (dissenting opinion)). Justice Frankfurter also remarked that '(f)airness of procedure is "due process in the primary sense * * *." It is ingrained in our national traditions.' (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 161 . . . (concurring opinion))."

> interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries." (Emphasis supplied).

This provision protects parties from burdensome discovery requests, where the burden of ascertaining the answer is substantially equal for the party seeking discovery as for the party from whom discovery is sought; it requires the party seeking the information to bear the discovery expense.

Clearly, here the amount of payment for the transfer agent's services in obtaining the list of class members will be identical for all parties. All necessary computer tapes, machinery and records are fully available to plaintiffs. *Sanders* v. *Levy,* 558 F.2d at 653; PA-52a. In these circumstances, plaintiffs must bear the expense of discovering the names and addresses of class members, under the long-established practice in federal civil discovery.[24] See *e.g., In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1102-3 (5th Cir. 1977) (where records containing identities of class members "may be examined as readily by the class representatives as defendants. . . . plaintiffs [i.e., the class representatives] are required at their own expense to compile a list of the absentee class members' names and addresses. . . ."); *Leonia Amusement Corp.* v. *Loew's Inc.,* 18 F.R.D. 503, 507 (S.D.N.Y. 1955); *Tytel*

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[24] The same result would obtain if share records were kept manually, and no lists existed of the names and addresses of shareholders who bought Fund shares during the relevant period. If defendants then afforded plaintiffs access to existing transfer sheets, it could hardly be contended that the cost of compiling the names and addresses of class members should be borne by defendants.

v. *Richardson-Merrell, Inc.,* 37 F.R.D. 351, 353 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures Inc.,* 20 F.R.D. 588, 593 (S.D.N.Y. 1957):

> "With regard to those interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, or by doing a little footwork, as the case may be."

If there is any explanation for the Second Circuit's erroneous choice of the applicable discovery rule, it is that under Rule 33(c), the court is without discretion to allocate discovery expenses, while under Rule 34 it has such discretion. The grounds which the Second Circuit majority purported to rely on for exercising such discretion in favor of plaintiffs were the Fund's ability to pay and the position taken by defendants with respect to plaintiffs' twin proposal for class reduction and broadcast mailing. The invalidity of these grounds has been demonstrated in Sections A and B of Point I, at pp. 28-33, *supra.*

Finally, the Second Circuit sought to justify imposing identification expenses on the Fund because the Fund has computerized its shareholder records, thereby allegedly making identification "more difficult" than it otherwise would have been (558 F.2d at 649; PA-43a):

> "Computers which in general make information more readily available, may occasionally make information more difficult to discover. Even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes

> may be required to extract information which might have been obtainable through a minimum of effort had different systems been used."

It must be observed that there are no facts in the record supporting these speculations of the Second Circuit. On the contrary, it appears more likely that retrieval of the names and addresses of the 121,000 class members would have been more difficult, laborious and expensive had the records not been computerized. It would then have required manual extraction of the names and addresses from daily transaction sheets covering more than 500 trading days during the relevant period, involving approximately 150,000 separate purchases by the 121,000 class members. (A-209). Even more important, however, as the Second Circuit majority recognized, the Fund could not operate without computers:

> "It scarcely need be said that the computer plays an integral role in the operations of the fund; indeed, in the absence of computer technology, operations so vast and complex as those of the fund might well be impossible to conduct." 558 F.2d at 647; PA-37a.

Equally unsupportable is the Second Circuit's suggestion that the Fund should have anticipated the need to be able to identify class members:

> "If the information demanded is such as the respondent might reasonably have expected to be required to make available for public examination or for the use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming." 558 F.2d at 649; PA-43a.

No evidence suggests that the Fund or any other defendant had any reason to anticipate a class action brought by the class on whose behalf plaintiffs have sued. Cf. *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974). As Judge Mulligan aptly stated for the dissenters, it would be unreasonable to force defendants to guess what diverse classes might choose to sue them and program their computers according to their anticipatory hunches:

> "But what law demands that the defendant maintain lists of past and present customers who might in the future band together to sue the corporation in some class whose perimeters will be fixed by the accidents and exigencies of possible litigation? . . . To require corporate defendants to so arrange their computer programming as to anticipate the endless variety of prospective classes which might some day bring class actions is, of course, unrealistic and not required by any law we know of until this decision which hopefully will be short lived." 558 F.2d at 654; PA-54a.

There is not the slightest hint in this case that defendants have deliberately tried to hamper the identification of class members through computer use. Computers are today a standard device used in businesses of various sizes. The recent study, Nyborg, McCarter & Erickson, *Information Processing in the United States: A Quantitative Summary,* published by American Federation of Information Processing Societies, Inc., Montvale, New Jersey (1977), p. 21, describes the extent of computer use in the United States as follows:

> "[C]omputer usage in the United States is dramatically increasing. The number of all *computers* installed in the United States has climbed from 88,000 in 1971 to 229,000 in 1976 . . .; similarly, spending by users on computers and computer services (equipment, services, and user salaries, exclusive of user overhead) has grown from $16.8 billion in 1972 to $30.9 billion in 1976. Further, the distribution of both usage and applications is extremely broad; as pointed out in a recent

issue of *Science* magazine [H.D. Mills, "Software Engineering," *Science,* Vol. 195, p. 1201 (1977)] '[a]lthough nothing of the kind existed 25 years ago, every sizable business, Government agency, and institution in the United States now depends in a critical way on data processing systems.'

Many factors have contributed to the growth of computer usage. For instance, IDC [International Data Corp.] in the June, 1976, *Fortune* magazine reported that the average costs of a computer has dropped from $326,000 in 1965 to $172,000 in 1976, a trend that is expected to continue through 1980. This price decrease reflects in part, IDC said, the advent of small business computers . . . which have made data processing increasingly accessible to even the smallest businesses." (Emphasis in text).

To the extent that the Second Circuit majority has imposed identification costs on the Fund because it uses computers, the Court has unfairly penalized the Fund for adopting a common business practice that it requires for survival in a complex and competitive world. To the extent that the Second Circuit would extend Rule 34 beyond its present scope to shift to defendants the cost of searching and creating computer tapes in order to identify class members, it exposes all litigants with computers, even nominal defendants, to the hazards of enormous litigation expenses in order to satisfy the insatiable demands for discovery by opponents, who may be only nominal adversaries. To the extent that the Second Circuit would apply any of the discovery rules in order to enable plaintiffs to avoid their obligations under Rule 23, it has without legal warrant violated the limits on the scope of discovery and nullified in material respects the Supreme Court's decision in ***Eisen IV.***

Conclusion

The judgment of the Second Circuit should be reversed, with directions to vacate the order of the District Court insofar as it relates to the payment of the cost of identification of class members, and to require plaintiffs to bear those costs if they choose to continue the class action.

December 15, 1977

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APPENDIX

Appendix of Rules Involved

Federal Rules of Civil Procedure

Rule 23(a)-(d), 28 U.S.C., *Class Actions.*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

• • •

Rule 26, 28 U.S.C., *General Provisions Governing Discovery.*

• • •

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

• • •

Rule 33, 28 U.S.C., *Interrogatories to Parties.*

• • •

(c) *Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

• • •

Rule 34, 28 U.S.C., *Production of Documents And Things And Entry Upon Land For Inspection And Other Purposes.*

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compliations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

FOR ARGUMENT

Supreme Court, U. S.
FILED
JAN 21 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States
October Term, 1977

No. 77-335

Oppenheimer Fund, Inc., Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy, Jack Nash, Edmund T. Delaney and Emanuel Celler,

Petitioners,

v.

Irving Sanders, Egon Taussig,
Michael Shaev and Rita Shaev,

Respondents.

RESPONDENTS' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY and EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV and RITA SHAEV,

Respondents.

RESPONDENTS' BRIEF

Rules Involved

The following rules were involved in the determination of this case and are set forth in full text in Appendix F to the Petition for a Writ of Certiorari filed with this Court on September 1, 1977:

Fed. Rule Civ. Proc. 23, 28 U.S.C.
Fed. Rule Civ. Proc. 26(b)(1), 28 U.S.C.
Fed. Rule Civ. Proc. 26(c), 28 U.S.C.
Fed. Rule Civ. Proc. 33(c), 28 U.S.C.
Fed. Rule Civ. Proc. 34, 28 U.S.C.

Questions Presented

1. Did the District Court have discretion to require defendant Oppenheimer Fund, Inc. (the "Fund") to bear the expense of identifying the class members in this case?

2. If the District Court had such discretion, did it, based upon the record in this case, abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes?

3. Assuming *arguendo* that the cost of identifying the class members must be regarded as a "notice cost", did the District Court commit reversible error in imposing this cost upon the Fund in this case, where a fiduciary duty pre-existed between the plaintiffs and the defendants herein, and, in addition, where there were special facts and circumstances involved which further warranted not applying the "usual rule" regarding "notice costs" in this case?

Statement of the Case

This is a proceeding to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 22, 1977 which, after rehearing en banc, affirmed the Order of the United States District Court for the Southern District of New York, which determined, among other things, that, under the facts and circumstances of this case, the Fund should bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes. The Court of Appeals held, on the basis of the record in this case, that the District Court did not abuse its discretion in entering said Order.

A. The Pleadings.

This consolidated action was brought by respondents ("plaintiffs") representatively on behalf of themselves and other persons similarly situated who purchased shares of the Fund subsequent to March 15, 1968 (A-21)*, and derivatively on behalf of the Fund (A-28), which is an open-ended investment fund registered under the Investment Company Act of 1940 with net assets in excess of $500,000,000 (A-122). These consolidated actions, which are based upon alleged violations of the Securities Act of 1933 (15 U.S.C. Section 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. Section 78a *et seq.*) and the Investment Company Act of 1940 (15 U.S.C. Section 80(a) *et seq.*), and various rules promulgated thereunder, are brought against defendant Oppenheimer Management Corporation (the "Manager"), which is the investment advisor to the Fund and the general distributor of its shares; defendant Oppenheimer & Co., which owns all of the voting stock of the Manager, and the individual defendants, who are directors of the Fund. Some of the individual defendants are also officers of the Fund, officers and directors of the Manager and/or partners in Oppenheimer & Co. (A-20-56, A-111-112) (PA-3a).**

The complaints in these consolidated actions allege, in substance, that the defendants caused the Fund to issue prospectuses and reports that were false and misleading, in that, among other things, they failed to state that the Fund would purchase "restricted" securities, and failed to describe the risks involved in such purchases. The complaints further allege, in substance, that the defendants caused the Fund to value improperly the restricted securities in the Fund's portfolio, thereby overstating the net asset value of shares of the Fund that were sold to the public; that the defendants caused the Fund to issue prospectuses and reports that were false and misleading in failing to disclose material information relating to the improper valuation of restricted securities in the Fund's portfolio; that the aforesaid conduct constituted a breach of fiduciary duties to the plaintiffs and the class, and that, as a result of the foregoing, persons who purchased shares of the Fund subsequent to March 15, 1968 were caused to pay false and inflated prices for their shares of the Fund. The complaints further allege that, as a result of said improper valuation of restricted securities, the Fund was caused to pay the Manager excessive fees under its management agreement and to redeem shares at inflated prices. The plaintiffs seek to recover damages on behalf of the members of the class who paid excessive prices for their shares of the Fund[1] and derivatively, on behalf of the Fund, to recover any damages sustained by the Fund and the profits made by the other defendants, including the excessive fees paid to the Manager (A-20-56, A-111-112, PA-3a-4a).

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* References are to pages of the Appendix.

** References are to pages in the Appendix to the Petition for a Writ of Certiorari.

The defendants have served amended answers denying any wrongdoing and asserting various affirmative defenses (A-57-90), including an alleged set-off against those members of the class who redeemed shares of the Fund since March 1968, for allegedly excessive amounts, as a result of the overvaluation of restricted securities in the portfolio of the Fund (A-66, A-78-79, A-88-89). In addition, the defendants other than the Fund have asserted in their amended answers that, if they are liable to the class by reason of the overvaluation of restricted securities in the portfolio of the Fund, then the Fund is liable to them to the extent that the Fund has received funds from overvaluation. (A-67, A-89-90).

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[1] The total aggregate damages suffered by the class have been estimated to be in the area of $1,500,000 (Document 93, p. 2 referred to on page A-9 of Appendix).

B. Prior Proceedings.

The three consolidated actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively, (A-111) and were consolidated for all purposes by order of the Court dated December 17, 1969. (A-113) Thereafter, the plaintiffs conducted extensive discovery proceedings, some of which, as indicated below, related to the identification of class members and the method and cost of sending notice to the class, including the service of two sets of interrogatories, the examination of numerous documents and the oral examination of several officers and directors of the Fund and the Manager and the deposition of the Fund's transfer agent. (A-113, A-163).

C. The Class Action Motion.

On March 30, 1973, plaintiffs moved for an order pursuant to Rule 23(c)(1) of the F.R.Civ.P. declaring that this consolidated action may be maintained as a class action on behalf of all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 (hereinafter referred to as "the class period"). (A-109-111) In support of their motion for a class action determination, plaintiffs set forth information showing that the requirements for a class action under Rule 23(a) and (b)(3) of the F.R.Civ.P. were met. (A111-120).

Following the submission of the class action motion in March 1973 (and after the Court of Appeals for the Second Circuit rendered its decision in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) ("*Eisen III*"), the plaintiffs, with the approval of the Court, conducted some discovery (principally the deposition of the Fund's transfer agent) to obtain additional information relating to the composition of the class, the identification of class members and the method and cost of sending notice to the class. (A-139-141). The defendants did not object to the proposed discovery, notwithstanding the fact that defendants stated that it would require the Fund's transfer agent to "assemble and compile information and statistical data," (A-133-134) except that the defendants argued that the discovery should be conducted by the use of written interrogatories, unless the plaintiffs paid, in the first instance, and subject to ultimate taxation of costs, the expenses of attendance of an attorney for each of the defendants at the place where the deposition was to be taken (Boston, Massachusetts), including reasonable attorneys' fees to be fixed by the Court. (A-133-134, A-135-136, A-137-138). The District Court, however, in its discretion, denied the defendants' application to require the discovery to be conducted by the use of written interrogatories and also denied the defendants' application to require the plaintiffs to pay, in the first instance, the expenses of attendance of an attorney for each of the defendants at the deposition. (A-163).

Thereafter, the deposition of the Fund's transfer agent, pursuant to the Federal Rules of Civil Procedure, was taken, and the discovery disclosed the following information:

1. There were approximately 121,000 persons who purchased shares of the Fund during the class period; (PA-4a, 5a)

2. The Fund currently had approximately 171,000 shareholders, of whom approximately 103,000 purchased shares of the Fund during the class period; (A-145, PA-5a, 38a)

3. There were approximately 18,000 persons who purchased shares during the class period and were no longer shareholders of the Fund; (PA-5a, 38a)

4. The names and addresses of the persons who purchased shares of the Fund during the class period could be culled out from the computer tapes of the Fund along with information indicating which of these persons were still shareholders of the Fund and which were not; (A-148)

5. The cost of culling out the aforementioned information with respect to the names and addresses of class members, which would involve the use and programming of computers, would be approximately $16,000; (A-148, PA-38a) and

6. There would be a charge of $0.01 per insert in connection with inserting the notice to class members in a regular mailing by the Fund to its shareholders. (A-146).

In December 1973, after the foregoing information had been obtained, plaintiffs, in an affidavit submitted to the Court, modified their application relating to the definition of the class and requested that this action be maintained as a class action on behalf of all persons who purchased shares of the Fund during the class period, and who, like the plaintiffs, were still stockholders of the Fund. (A-142-143). This modification, it was noted, would simplify the issues in the case by eliminating, at least in part, the defense asserted by defendants in their amended answers, to the effect that defendants were entitled to a set-off against those persons who purchased shares in the class period but thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the Fund's portfolio; it would facilitate the distribution of any recovery to the class and, most importantly, as explained below, it would obviate the need for culling out the names and addresses of the class members and would thus reduce the expenses involved in connection with the further prosecution of the case as a class action. (A-142-144).

The definition of the class sought by plaintiffs would have obviated the need for culling out the names and addresses of the members of the class from the Fund's computer tapes in order to give notice to the class, since, if all of the members of the class were current shareholders of the Fund, the class notice could then be enclosed in a regular mailing by the Fund to all of its shareholders, which would include all the class members. Thus, the method of giving notice proposed by the plaintiffs would have provided for actual individual notice by mail to all members of the class apprising them of the pendency of the action and of their right to request exclusion from the class pursuant to the provisions of Rule 23. (A-145-147). Furthermore, since the proposed class was defined by the plaintiffs with precision (all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund on a specified date prior to the mailing of the class notice), there would be no problem in entering a judgment in the action, whether favorable or not to the class pursuant to Rule 23(c)(3), describing the persons who were bound by the judgment.[2] (A-146).

Plaintiffs stated that they would pay for the costs of preparing the necessary notices and would pay for any extra costs involved in mailing the class notice in the manner proposed by them, including the cost of inserting the notice in a regular mailing by the Fund to all its

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[2] In the event of a recovery in the action, the names and addresses of class members would, of course, be ascertained in connection with the distribution of the recovery. (A-145).

current stockholders. (A-146). It was estimated that these costs, which the plaintiffs were prepared to pay, would be approximatey $5,000. (A-146). If it were necessary, however, to ascertain the names and addresses of the class members in order to give notice to the class, the total costs involved in connection with giving notice would be in excess of $20,000. (A-148). The plaintiffs indicated that, if they were required to pay at that time the expense of identifying the class members as well as the costs of sending notice to the class, they would not continue prosecution of the action as a class suit. (A-148-149).

The defendants opposed the definition of the class sought by plaintiffs which limited the class to persons who were still stockholders of the Fund, presumably because it would limit the *res judicata* effect of this action.[3] (PA-5a, 45a). Defendants also objected to the distribution of the class notice in the manner proposed by the plaintiffs, i.e., directing the notice specifically to those shareholders of the Fund who purchased during the class period and enclosing the notice in a regular mailing of the Fund to all of its 171,000 shareholders, claiming that this method would result in the notice being received by approximately 68,000 shareholders of the Fund who were not members of the class, and that this would somehow have an adverse effect on the Fund, including allegedly precipitating a flood of redemptions by these shareholders. (A-129-132). In response to defendants' objections, plaintiffs pointed out that, since 1970, the Fund had apprised its shareholders in its proxies, prospectuses and annual reports, no fewer than 13 times, of the pendency of this action, and the nature of the claims alleged herein, and of the fact that, in the opinion of their counsel, and counsel for the Manager, the suits have "no legal merit." Plaintiffs contended that the defendants had not made an adequate showing to support their claims of alleged harm, and that defendants' claims were motivated by a desire to maximize the costs involved in an effort to prevent the action from proceeding as a class suit, and that defendants had not raised any valid objections to the method of giving notice proposed by the plaintiffs. (A-147-148).

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[3] Since, at the same time, the defendants themselves sought to *limit* the class to persons who purchased shares of the Fund prior to April 25, 1969 rather than April 24, 1970 (A-128), it may well be that, in seeking to have the class defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class), the defendants were principally interested in increasing the expenses involved in connection with giving notice to the class in the hope that the district court would impose these added expenses upon the plaintiffs and that this would prevent the action from proceeding as a class suit.

All of the issues raised by plaintiffs' motion for a class action determination were fully explored and briefed by the parties and were carefully considered by the District Court prior to its decisions on the motion. On several occasions, the Court requested additional information and briefing with respect to various matters, including the definition of the class, the appropriate method of giving notice to the class in this case, the effect of the decision in *Eisen III* and the appropriate allocation in this case of the cost of culling out a list of class members from the Fund's computer tapes under the discovery rules[4] and in

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[4] At a conference with the District Court on June 28, 1974, the use of the discovery rules to ascertain the names and addresses of class members was discussed by counsel and the Court, and the Court requested counsel to submit additional briefs dealing with, among other things, the question of whether the names and addresses of class members may be obtained under the discovery rules, and if so, the appropriate allocation of the cost of discovering this information in this case. On July 16 and July 17, 1974, briefs were submitted by all of the parties dealing with this question. (See Documents 89, 90 (pages 2-6), 92 (pages 6-9), and 94 (pages 9-11) listed in the "Index of Documents Filed," at page A-9.)

light of all the facts and circumstances in the case (Documents 33, 34, 40-43, 45, 49-52, 70, 78, 79, 82-87, 89-98, 101-111, 113).[5]

Decision and Memorandum Order of the District Court

On May 15, 1975, the District Court rendered a decision determining that this consolidated action may be maintained as a class action under Rule 23(b)(3) of the F. R. Civ. P.[6] on behalf of all persons who purchased shares of the Fund between March 15, 1968[7] and April 24, 1970.[8] (PA-2a).

With respect to the definition of the class, the method of giving notice to the class and the allocation of the costs of culling out from the Fund's computer tapes the names and addresses of the class members, the District Court rendered a decision that took into account the respective positions and proposals urged by the parties with respect to these matters, and constituted the Court's considered judgment as to what would be a fair overall disposition of the matter, based upon the particular facts and circumstances in this case. (PA-1a-8a). The Court agreed to define the class as requested by the defendants to include those persons who were no longer shareholders of the Fund, and agreed to defendants' related request that notice not be sent out in the manner proposed by the plaintiffs i.e. including the notice in a regular mailing to all current shareholders of the Fund, thereby necessitating the identification of the specific names and addresses of class members in order to send notice to the class. With regard to the matter of culling out the names and addresses of the class members from the Fund's computer tapes, the Court determined that it would be appropriate, on the basis of the facts and circumstances of this case, that this expense, which was necessitated by the defendants' requests with regard to the definition of the class and the method of giving notice to the class, be the responsibility of the defendants, and the Court indicated that the Fund should bear the cost of culling out from its computer tapes the names and addresses of the class members in this case. In reaching this decision, the District Court stated:

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[5] References are to documents listed in the "Index of Documents Filed" at pages A-4 to A-12 of the Appendix.

[6] The District Court found that the requirements of a class action under Rule 23 were "clearly met" in the instant case, rejecting defendants' assertions to the contrary, including defendants' claim that the action was unmanageable as a class suit. (PA-4a-5a).

[7] The starting date of the class period was modified in Judge Griesa's memorandum order of September 30, 1975, on consent of the parties, to March 28, 1968. (PA-10a).

[8] The Court rejected the defendants' claim that the class should be limited to persons who purchased prior to April 25, 1969. (PA-6a-7a).

> "Moreover, with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (PA-6a).

The District Court further determined that the plaintiffs would be responsible for preparing and mailing the necessary notices to the members of the class at their expense. (PA-2a, 8a).

After all parties moved for reargument, the District Court, in a memorandum order dated September 30, 1975,

denied essentially all of the motions for reargument. The District Court indicated in its memorandum order that the cost of culling out the list of class members shall be borne by the Fund without prejudice to the right of this defendant at the conclusion of the action to make whatever claim it would be legally entitled to make regarding reimbursement by another party;[9] and that, as to the mailing of notices, plaintiffs are to have the option of: (a) sending them out in their own mailing, or (b) including them in a regular mailing of the Fund, provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra cost of mailing, including the cost of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders. (PA-9a-10a).

The Panel Decision

On June 30, 1976, a three-judge panel of the Court of Appeals[10] determined that the granting of class action status was proper. (PA-25a). A majority of the panel (Judge Hays dissenting) determined, however, that the order of the District Court directing the Fund to bear the cost of culling out the names and addresses of class members from the Fund's computer tapes should be reversed. (PA-25a). In reaching this decision, the majority stated that the cost of discovering information as to the names of class members did not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes (PA-21a-22a); that the discovery rules were inapplicable (PA-21a-23a); that the District Court had no discretion in this matter, and that *Eisen III* and *Eisen* v. *Carlisle and Jacquelin,* 417 U.S. 156 (1974) (*"Eisen IV"*), required the plaintiffs to bear the expense of identifying the class members. (PA-21a-23a). The majority also held that the "usual rule" set forth in *Eisen III* and *Eisen IV* that the plaintiff must bear the "costs of notice," must be applied in the instant case, notwithstanding the fact that a fiduciary duty pre-existed between the plaintiffs and the defendants, including the Fund, and that the District Court had found that the additional expense of culling out the names and addresses of class members from the Fund's computer tapes was attributable to defendants' request with regard to the definition of the class. (PA-15a-21a).

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[9] In its motion for reargument, the Fund had requested the Court to clarify its ruling as to which of the defendants are to bear the cost of culling out the names and addresses, and that, if the Court required the Fund to bear such cost, its ruling should set forth that the payment at this time is an advance and that there has been no determination of the question of contribution. (Document 106, p. 7, A-11). It may be noted that the District Court had, in fact, already indicated, in its decision of May 15, 1975, that the Fund was to be responsible for this cost. (PA-2a). The Manager, in its motion for reargument, asserted that, "[i]f the defendants are to bear the cost of preparing lists, such cost should be advanced in the first instance by the Fund, as provided in the Court's opinion (at p. 2)." (Document 102, p. 5, A-10).

[10] The panel consisted of Circuit Judges Hays and Mulligan and District Judge Palmieri sitting by designation.

In his dissenting opinion, Judge Hays stated:

> "The majority's decision, ostensibly predicated on the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin* (*Eisen IV*), 417 U.S. 156 (1974), uncritically treats a discovery issue as notice and indiscriminately applies a rule appropriate to arm's-length relationships to the fiduciary relationship between the parties herein." (PA-25a-26a).

Judge Hays further observed that identification of class members is ascertainable by discovery:

> "When identification is sought information allowing a party to proceed with his suit is at the core of the

> request. Thus, in purpose and effect such a request is not different in kind from other requests for information routinely made during discovery. That a suit will be unable to proceed absent identification does not vitiate the validity of characterizing identification as a product ascertainable by discovery and governed by the rules applicable thereto. A contrary view clearly is belied by the common practice of establishing jurisdiction by means of discovery." (PA-27a-28a).

After noting that the allocation of the expense involved in obtaining such information traditionally rests within the sound discretion of the district court and should not be disturbed absent a showing of abuse of discretion, Judge Hays concluded that the District Court had not abused its discretion in the instant case in requiring the Fund to bear the cost of culling out the names of class members from the Funds' computer tapes. Judge Hays said:

> "* * * expense remains an issue properly resting within the sound discretion of the district judge. Under the facts of this particular case the district judge did not consider the costs of processing the defendant's tapes an 'undue burden or expense.' It is not our practice to disturb the discretionary judgment of a district court in the realm of discovery absent a showing of abuse, *see, e.g., Baker* v. *F & F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories,* 384 F.2d 97 (2d Cir. 1967), and discovery of class members should provide no exception. Imposing the cost of culling out the names of members of the class upon the Fund involved no abuse of discretion. The district court, finding this expense attributable to defendants' objections to plaintiffs' efforts to define a subclass minimizing expenses, cf.

> Eisen IV, supra at 179, n.16, did not commit reversible error in refusing to shift this burden to plaintiffs." (PA-29a).

Judge Hays also reasoned that even if the expense involved in identifying members of the class must be regarded as a "notice cost" rather than a discovery expense, the "usual rule" should not be applied in the instant case since the Investment Company Act clearly imposed a fiduciary duty of the highest order between the defendants and the plaintiff class and that, under these circumstances, the District Court might properly impose said cost upon the Fund in this case. (PA-29a-31a). In reaching this conclusion, Judge Hays noted that the application of the "usual rule" to the instant case would create "a serious potential for insulating fiduciary breaches from redress." (PA-31a).

The Court of Appeals *En Banc* Decision

On September 14, 1976 the Court of Appeals granted the plaintiffs' petition for a rehearing *en banc* with respect to the question of whether the District Court had committed reversible error in directing the Fund to bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes.

On rehearing *en banc,* the Court of Appeals[11] (Mulligan, Van Graafeiland and Meskill, *JJ.,* dissenting) affirmed the order of the District Court directing the Fund to bear the expenses of culling out the names and addresses of class members from the Fund's computer tapes.

The Court of Appeals rejected the contention that the plaintiff in all cases must bear the cost of discovering information as to the names and addresses of class members as part of his obligation under *Eisen IV* to bear the cost of printing and mailing the notice to the class. (PA-39a-40a). In rejecting this contention, the Court of Appeals stated that the information sought by plaintiffs as to the names and addresses of the members of the class was within the broad scope of permissible discovery established by the Federal Rules, and that Rule 34, which is specifically applicable to the discovery of computerized information, provided an ample basis for the District Court's order directing the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. (PA-40a-41a).

The Court of Appeals further stated that while the District Court has discretion under Rule 34 coupled with Rule 26(c) of the Federal Rules to shift the cost of discovery of computerized information to the discovering party where the demand for information would impose upon the respondent "undue burden or expense", the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case. (PA-41a, 43a-44a). In reaching this conclusion, the Court of Appeals indicated that, although compliance with the District Court's order involved an expenditure by the Fund of approximately $16,000, the Court of Appeals could not say that the burden thus imposed was unreasonable in light of the nature of the information sought and the extent and character of the Fund's business operations. (PA-43a, 44a-45a). The Court of Appeals also stated that the order of the District Court allocating the cost of discovery of the computerized names and addresses of the class members was not unreasonable in light of the District Court's definition of the class. The Court of Appeals noted that the cost of discovering the names and addresses of the class members was occasioned by the

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[11] The *en banc* court consisted of Chief Judge Kaufman and Circuit Judges Hays, Feinberg, Mansfield, Mulligan, Oakes, Timbers, Gurfein, Van Graafeiland and Meskill.

District Court's agreement to define the class as sought by the defendants. (PA-45a-46a).

In conclusion, the Court of Appeals stated:

> ". . . [W]e are not disposed to hold that the District Court's refusal to impose on plaintiffs the cost of discovery of the computerized names and addresses was an abuse of discretion. Indeed, the order of the District Court accommodated the competing interests in a manner which was fair and imaginative."[11] (PA-46a).

Summary of Argument

1. The District Court had discretion to require the Fund to bear the expense of identifying the class members in this case. *Eisen IV* did not hold, as defendants contend, that information as to the names and addresses of the class members may not be obtained through discovery nor did it indicate that the cost of obtaining this information must be borne in all cases by the plaintiff, as part of his obligation to bear the cost of printing and mailing the notice to the class. There are significant factual and legal differences between what is involved in obtaining or discovering information as to the names and addresses of class members, and what is involved in the mechanical tasks of preparing and mailing a notice.

It has been well recognized that information as to the names and addresses of class members is relevant to the subject matter of a class action and may be obtained under the discovery rules. Such information was needed by plaintiffs in this case pursuant to the order of the District Court in order to insure compliance with the requirements of Rule 23(c)(2). The allocation of expenses involved in the discovery of information, whether germane to class action requirements or to the merits of the case, has traditionally rested within the sound discretion of the district courts; and the district courts' determinations with respect to the allocation of such expenses have been disturbed only upon a showing that there has been an abuse of discretion.

The question of whether th[illegible]aintiff or the defendant should bear the cost of discovering or obtaining information as to the names and addresses of class members, which, as in the instant case, is in the possession of the defendants, should rest, as it traditionally has, within the sound discretion of the district court, which is in the best position to evaluate properly all of the relevant facts and circumstances in each case and to resolve this question in a fair and equitable manner. The adoption of an inflexible rule that would deprive the district court of any discre-

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[11] The Court of Appeals noted that its affirmance of the District Court's order was without prejudice to a claim by the defendant Fund for discretionary taxation of the cost of discovery of the names and addresses of the class members against plaintiffs, should the plaintiffs ultimately lose. (PA-47a). The Court further noted that the plaintiffs' "present unwillingness to pay this cost does not immunize them from a judgment for costs, nor does it necessarily diminish the deterrent effect of such a judgment against a strike suit." (PA-47a). The Court also pointed out that, as a result of the decision by the District Court, it will cost the plaintiffs $20,000 in comparison to the $5,000 expense that their proposed class definition and method of notice would have entailed (PA-38a, 46a), and that the "requirement that plaintiffs bear the $20,000 expense of notifying the class is itself a formidable deterrent to frivolous litigation, for, if plaintiffs lose, they cannot recover their disbursements." (PA-47a). It may also be noted, in connection with the foregoing, that, while plaintiffs in December 1973 indicated to the District Court that they would not continue the prosecution of the action if they were then required to pay the expenses involved in identifying the class members, plaintiffs have never asserted that, if the defendants were ultimately to prevail and if the district court in its discretion taxed these expenses against them, they would not or could not meet their legal obligations at the conclusion of the case.

tion in this matter might well produce inequitable results in cases, particularly where information as to the names and addresses of class members has been computerized by the defendants.

The decision in this case should not be based, as defendants urge, upon specious policy arguments or grossly distorted and unfounded claims about class actions generally, which have been set forth by defendants, but rather upon the facts and the law in this case.

The determination by the Court below that the District Court had discretion to require the Fund to bear the expense of identifying the class members in this case is well supported by the federal rules and by applicable case law and is fully compatible with the principles set forth by this Court in *Eisen IV*.

2. The District Court did not abuse its discretion, based upon the record in this case, in requiring the Fund to bear the expense of culling out the names of class members from its computer tapes. Rule 34 of the Federal Rules, which is specifically applicable to the discovery of computerized information, provides ample foundation for the District Court's order, in the instant case, requiring the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. It is well settled that, under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data even though a considerable burden or expense may be involved, and that in order to shift the expense to the other side, the responding party must show not only that the request for information is burdensome or expensive but that the burden or expense is so excessive as to be unreasonable or oppressive.

The determination by the Court below that the District Court, while it had discretion to shift the expense of special computer programming to the plaintiffs, did not abuse its discretion in declining to do so in this case, is well supported by the record in this case. As the Court below found, it cannot be said that "the burden thus imposed is unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations". (PA-44a). Furthermore, as the Court below indicated, the District Court's order allocating the costs of discovery of the computerized names and addresses of class members was not unreasonable in light of the fact that this added cost was attributable to the defendants' request with regard to the definition of the class.

3. Even if the cost of identifying the class members must be regarded as a "notice cost" under *Eisen IV*, the District Court could properly impose said "notice cost" on the defendant Fund in this case since there was a fiduciary duty of the highest order which pre-existed between the plaintiffs and the defendants herein, and, in addition, there were special facts and circumstances involved in the case, i.e. the added cost of identifying the class members was necessitated by the defendants' request with regard to the definition of the class, which provided further justification for departing from the "usual rule" regarding the payment of "notice costs" in this case. This Court, in *Eisen IV* noted that the usual rule that the plaintiff must bear the "cost of notice" may not apply where, as in this case, there was a fiduciary relationship between the plaintiff and the defendant. In *Eisen III*, it was also indicated that justification may exist for holding that the plaintiff is not obligated to bear the cost of notice where, as in this case, there are special facts and circumstances involved.

POINT I

The District Court Had Discretion to Require the Fund to Bear the Expense of Identifying the Class Members in This Case.

Defendants contend that the plaintiff is required in all cases to bear the cost of discovering or obtaining information as to the names and addresses of class members under *Eisen IV* as part of his obligation to bear the cost of printing and mailing the notice to the class. Defendants' reliance upon *Eisen IV* in this regard is, however, misplaced. *Eisen IV* did not hold that information as to the names and addresses of class members may not be obtained through discovery, nor did it indicate that the cost of obtaining this information must be borne in all cases by the plaintiff. Indeed, *Eisen IV* did not even deal with the question of allocating the costs of obtaining information as to the names of class members.[13]

Defendants argue, nevertheless, that it is a prerequisite to sending the notice mandated by *Eisen IV* that plaintiffs obtain the names and addresses of those to whom the notice will be sent,[14] and therefore the cost of obtaining this

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[13] In *Eisen*, the defendants had agreed to bear the cost of providing the names and addresses of those class members who could be identified, "in the first instance with ultimate costs to abide the event . . ." (*See* Appendix to *Eisen IV* at page A-185). Thus, the "costs of notice" that were the subject of discussion in *Eisen IV* did not include the expense of identifying the class members and were limited to the costs of preparing and mailing the notice.

[14] Identification of class members is not necessarily a prerequisite in all cases to sending notice to the class, as asserted by defendants. Indeed, in the instant case, the method of notice of the class proposed by plaintiffs i.e. including the notice in a regular mailing by the Fund to all its shareholders, would have satisfied the requirements of Rule 23, without necessitating the specific identification of class members prior to mailing the notice. See p. 8 *supra*.

information must be borne by the plaintiff under *Eisen IV*. Defendants' argument is not well founded. First, defendants mistakenly assume that, simply because it may be necessary to obtain the names and addresses of class members prior to giving notice to the class, this information may not be obtained under the discovery rules. If this were true, it would also follow that information relating to the definition of the class, to whether the members of the class "can be identified through reasonable effort" and to what is "the best notice practicable under the circumstances," all of which must also be obtained prior to giving notice to the class, could not be obtained through discovery. Yet, in this very case, discovery was permitted by the District Court without objection by the defendants with respect to these matters and other matters relating to the method and cost of sending notice to the class.

Defendants' argument also totally ignores the significant factual and legal differences between what is involved in obtaining *information* as to the names and addresses of class members and what is involved in preparing and mailing the notice. The preparation and mailing of the notice are matters which the plaintiff may attend to on his own without relying upon the defendants to accomplish these mechanical tasks. Furthermore, the costs of preparing and mailing the notice are not dependent upon anything within the possession or control of the defendants. It is quite a different matter, however, with respect to obtaining information as to the names and addresses of class members which, as in the instant case, is in the possession and control of the defendants. The plaintiffs must look to the defendants to secure this information in order to comply with the notice requirements of Rule 23(c)(2)[15] and the cost of obtaining this information may be affected by the actions of the defendants. Under such circumstances, the creation of a hard-and-fast rule, as urged by the defendants, which would require the plaintiff to bear the cost of obtaining said information in all cases and which would deprive the District Court of all discretion in this area, might well create a significant potential for abuse which would produce inequitable results in many cases. In this connection, Judge Hays, in his dissent to the panel's decision noted that there were serious dangers involved in so restricting the discretion of the District Court, particularly in dealing with the recovery of computerized information. Judge Hays said:

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[15] Defendants disingenuously assert that plaintiffs do not need this information in order to comply with the notice requirements

> "Since the disclosing party has opted to keep his records on computer tapes, there is good reason to allow the district court the usual discretion as to costs of retrieving information from those tapes lest discovery be obstructed by irretrievably burying information to immunize business activity from later scrutiny." (558 F.2d at 645 n.17; PA-28a).

In *Eisen IV*, this Court held that the costs of printing and mailing the notice are in the usual case the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra,* at 179. The expenses involved in the discovery of information, however, have not been automatically regarded as part of the ordinary burden of a party of financing his own suit, but rather the allocation of such expenses has traditionally rested within the sound discretion of the district courts. *Eisen IV*

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in this case. Petitioners' Brief, pp. 22, 49. Under the Order of the District Court, however, the plaintiffs have the responsibility for mailing the notice to all class members, including those who are no longer shareholders of the Fund. Thus, the plaintiffs must have this information if they are to insure that the required notice is set to all class members as required by the District Court.

did not hold, as defendants at times seem to suggest, that all costs attributable to instituting a class suit, including the costs of discovering or obtaining information relating to the class action requirements, must be borne by the plaintiff in each case, notwithstanding the well-settled rule that the allocation of these expenses should rest in the sound discretion of the district court.[16] Matters pertaining to discovery of information, whether they relate to class action matters,[17] as in the instant case, or to the merits of the case, have been left to the sound discretion of district courts; and the district courts' determinations with respect to the allocation of discovery expenses have been disturbed only upon a showing that there has been abuse of discretion.[18]

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[16] We agree with defendants' assertion, at page 19 of their Petition for a Writ of Certiorari, that this Court in *Eisen IV* did not intend to distinguish between "class actions and other forms of adversary proceedings." Yet, this is precisely what defendants urge this Court to do by seeking to have this Court distinguish between the discovery of information that is relevant to the subject matter of a class action and the discovery of information in other forms of adversary proceedings.

[17] It is well settled that plaintiff is entitled to conduct discovery with respect to a broad range of matters which pertain to the maintenance of a class action under Rule 23. See 3B *Moore's Federal Practice* §23.50, p. 136 (1976-1977 Supplement); 7A Wright and Miller, *Federal Practice and Procedure,* §1785, p. 131 (1972 ed.); *Branch* v. *Reynolds Metals Co.*, 17 F.R. Serv.2d 494, 495 (E.D. Va. 1972); *Dickerson* v. *United States Steel Corp.*, 18 F.R. Serv.2d 554, 555 (E.D. Pa. 1974); *Shapiro* v. *Merrill Lynch,* 70 Civ. 3653 (S.D.N.Y. 1974 unreported decision).

[18] The assertion by the defendants that the decision below is improper because it forces the defendants to subsidize the suit against them, is without merit. A defendant in any lawsuit, whether it be a class action or not, is frequently required to bear substantial expenses in connection with discovery conducted by the plaintiff. Thus, it could be argued in any case that, whenever a defendant is required to bear the cost of providing information to the plaintiff in connection with discovery, which information may be used by the plaintiff in prosecuting his suit (or may

Thus, it has been well recognized that information as to the names and addresses of class members is relevant to the subject matter of a class action and may be obtained under the discovery rules. As the Court below stated:

> "It hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery established by our Federal Rules. Under Rule 26, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . .' Fed. R. Civ. P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are 'relevant to the subject matter' of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. *See Appleton Electric Co.* v. *Advance United Expressways,* 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.,* 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972), . . ." [19] (558 F.2d at 648; PA-40a)

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be even essential to the continued prosecution of his suit where the information pertains to matters such as the existence of jurisdiction), the defendant has been forced to subsidize the suit against himself. It is well settled, however, that it is not improper, per se, for a defendant to be required to bear such expenses. The issue is, rather, whether compliance with the discovery demand would impose upon the defendant "undue burden to expense." The determination of this issue rests within the sound discretion of the district court. *Baker* v. *F & F Investment,* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); *H. L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories,* 384 F.2d 97 (2d Cir. 1967); *Harvey* v. *Eimco Corp.,* 28 F.R.D. 381 (E.D. Pa. 1961).

See also, Hickman v. *Taylor,* 329 U.S. 495, 507 (1947), where this Court indicated that the discovery rules "are to be accorded a broad and liberal treatment"; *Burstein* v. *Slote,* 12 F. R. Serv. 2d 577, 580 (S.D.N.Y. 1968); and *Chevalier* v. *Baird Sav. Ass'n,* 72 F.R.D. 140, 148 (E.D. Pa. 1976).

In *Burstein* v. *Slote, supra,* the Court stated:

> *"In view of the mandatory notice requirement of Rule 23(c)(2)* (once an action is judicially determined to be maintainable as a class suit), and no indication present that plaintiffs are abusing the *discovery rules* so as to harass defendants, *plaintiffs are permitted to inquire of defendants on oral examination as to the names of the purchasers of securities of Manufacturers Credit Corp. and its related entities, . . ."*

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[19] In *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 138 (7th Cir. 1974) the Court of Appeals held that the District Court had not abused its discretion in requiring the defendant carriers to provide the names and addresses of shippers who were members of the class, notwithstanding the testimony by defendants as to the difficulties and costs involved in furnishing this information. In reaching this conclusion, the Court said:

> ". . . [I]n view of the broad discovery of class members permitted in this circuit. . . ., it would indeed be anomalous to place restrictions on discovery in this refund case." (494 F.2d at 138) (citations omitted)

The District Court in *Appleton* did not require the defendants to provide information as to the names of class members in order to "penalize" the defendant carriers, as defendants herein assert, but rather because the information as to the names of class members was in possession of the defendants and said information, which, as the Court indicated, was subject to discovery, was needed to send notice to the class.

> "Plaintiffs, of course, may not use this information to notify other members of the putative class of the pendency of these actions unless and until they are denominated class actions by court order." (Emphasis supplied.) 12 F. R. Serv. 2d at 580.

In *Chevalier* v. *Baird Savings Assoc., supra,* the Court stated:

> ". . . [W]e agree with plaintiffs that the names of the class members are discoverable. Quite clearly they fall within the ambit of rules 34 and 26(b) of the Federal Rules of Civil Procedure. And since the cost of identification would be fairly nominal for the defendants (approximately $14,500 spread over 22 banks) we are inclined to think that we would not enter a protective order, or require plaintiffs to reimburse defendants for the costs of collecting this information." 72 F.R.D. at 78.

Notwithstanding the foregoing authorities to the contrary, the defendants contend that information as to the names and addresses of class members may not be obtained pursuant to the discovery rules. Defendants argue that discovery of information relating to the identification of class members must be distinguished from discovery of information generally, presumably because the former relates to certain class action requirements in the case. Carried to its logical conclusion, the defendants would make the discovery rules inapplicable to other matters (in addition to the identification of class members) that are germane to the requirements for maintaining a suit as a class action under Rule 23, such as the description of the class, the number of class members, etc.[20] Such a result

would be clearly unsound and unfounded in either the federal rules or case law.[21] If plaintiffs are permitted under the discovery rules, as we believe is clearly the case, to obtain information as to the definition or scope of the class, the number of class members, the appropriate method of giving notice etc., it would be arbitrary, we submit, to hold that the plaintiffs may not obtain information under the discovery rules as to the names and addresses of the class members so as to satisfy the requirements of Rule 23(c)(2) that individual notice be mailed to all members of the class who can be identified through reasonable effort.

The fact that Rule 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," does not, as defendants contend, indicate that the identification of class members is not subject to discovery. If this were true simply because the identification of class members is referred to in the same paragraph of Rule 23(c)(2) as the provisions for giving notice to the class, it would also follow that information relating to whether the members of the class "can be identified through reasonable effort" or what is "the best notice practicable under the circumstances," which are also referred to in the same paragraph of Rule 23(c)(2), would not be obtainable through discovery. Yet, as noted above, in this very case discovery was permitted by the District Court, without objection by the defendants, with respect to these matters and other matters relating to the method and cost of sending notice to the class. If such information may be obtained through discovery, there is no logical basis for the contention that information relating to the names and addresses of class members is not subject to discovery, and the courts have specifically recognized, as indicated above, that, because of the mandatory notice requirements of Rule 23(c)(2), a plaintiff should be allowed to obtain information pursuant to the discovery rules as to the names of class members.

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[20] If this were the case, plaintiffs might find it impossible to demonstrate to the Court that the various requirements of Rule 23 have been satisfied.

[21] *See* text and cases cited, *supra*, page 25, footnote 17 and pages 26-28.

The defendants also make the rather disingenous argument that, while information as to the names and addresses of class members may be relevant in determining whether the requirement of Rule 23(c)(2) that individual notice be sent to all members of the class who can be identified through reasonable effort has been satisfied, the fact that this issue has not yet been presented to the Court for adjudication makes said information irrelevant to the subject matter of this class action. It is evident, however, that information that is otherwise relevant to the subject matter of the action, and thus, within the permissible scope of discovery, is not rendered irrelevant and outside the scope of discovery, as defendants urge, simply because, the issue with respect to which the information relates has not yet been presented to the Court for adjudication.[22] Defendants' self-serving assertion (at page 50 of their brief) that this issue "would not be raised by the Fund . . . nor the plaintiffs . . ." [22a] simply begs the question. The issue of whether the requirements of Rule 23(c)(2) have been satisfied depends upon information with respect to the names and addresses of the class members that is contained in the Fund's computer tapes and thus, this information is clearly relevant to the subject matter of this action.

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[22] It is well recognized that information sought to be discovered need not even be relevant to the "issues" in the case and that "relevancy to the subject matter is all that is required". 8 Wright & Miller, *Federal Practice & Procedure* §2008 at 41-42.

[22a] Defendants are silent as to whether the issue might be raised by any of the other defendants in the case, by any member of the class, or by the District Court on its own motion.

The defendants rely heavily upon the decision in *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. 1977) in support of their contention that the plaintiff must bear the cost of identifying the names and addresses of class members in every case and that the district court has no discretion in the matter. The decision in *Nissan,* however, does not support the defendants' contention. In *Nissan,* the Court, after noting that its "review of the class action issues raised in this appeal is limited to whether the district court abused its discretion," (552 F.2d at 1096), considered the particular facts and circumstances involved in the case, and on the basis thereof, the Court determined that plaintiffs should be required at their expense to compile a list of the names and addresses of the class members from the defendants' business records. The Court did not base its determination on any hard-and-fast rule as to which party should bear the expense of obtaining information with respect to the names and addresses of class members. Indeed, the Court noted that "[e]xamination of the decisions treating this question reveals that . . . both plaintiffs and defendants have been ordered to compile information necessary to the identification of absentee class members," and that, in almost all of these cases, the district courts had appeared to have adopted a "rule of reason" approach involving the determination of which of the parties would have the easier task of gathering the information sought (552 F.2d at 1101). Furthermore, while indicating that in their opinion the discovery rules should not "control the question's final resolution," the Court in *Nissan* stated that "the spirit of those rules and the decisional law developed under them may offer guidance in resolving which party should furnish absentee class members' names and addresses" (552 F.2d at 1102). It is thus apparent that the decision in *Nissan* requiring the plaintiffs to bear the expense of compiling a list of the names and addresses of class members is based upon the particular facts involved in that case and not upon a hard-and-fast rule.

The defendants' contention that a substantial majority of the relevant cases have made no distinction between the costs of printing and mailing the notice and the costs involved in obtaining information as to the names and addresses of class members, is also totally unfounded. In the cases referred to by defendants in their brief (p. 26, fn. 18), the question of whether the cost of obtaining information as to the names and addresses of class members should be borne by the plaintiffs or the defendants was determined by the courts on the basis of the particular facts and circumstances in each case, notwithstanding the fact that *Eisen IV* requires the plaintiff to bear the cost of printing and mailing the notice. If the cost involved in discovering or obtaining information as to the names and addresses of class members had been simply regarded in these cases as part of the cost of printing and mailing the notice, as defendants urge, then these decisions, particularly those rendered since *Eisen III* and *Eisen IV*, would not have turned upon the particular facts and circumstances in each case, as they do, nor would they have resulted in the costs being borne by the defendants[33] in

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[33] *E.g.*, *Foster* v. *Maryland State Sav. & Loan Ass'n*, 1974-2 CCH Trade Cases ¶75,277 (D.D.C. 1974); *Chevalier* v. *Baird Sav. Ass'n.*, *supra*; *Richardson* v. *Hamilton International Corp.*, 62 F.R.D. 413 (E.D.Pa. 1974); *Hawkins* v. *Holiday Inns, Inc.*, 1975-1 CCH Trade Cases ¶60,158 (W.D. Tenn. 1975); *City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH Trade Cases ¶60,012 (S.D.N.Y. 1976); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 25 (S.D. Iowa 1972); *B&B Investment Club* v. *Kleinert's Inc.*, 1973-74 CCH Fed. Sec. L. Rep. 1 ¶94,451 (E.D.Pa. 1974); *Herbst* v. *Able*, 47 F.R.D. 11 (S.D.N.Y. 1969); *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969). In each of these cases, the information with respect to the names and addresses of class members, as in the instant case, was in the possession of the defendants. In *Foster*, the information was contained in the defendants' computer tapes.

some cases and the plaintiffs[34] in others. None of the cases cited by the defendants support their broad contention that in every case, plaintiffs *must* bear the expenses involved in obtaining information as to the names and addresses of class members as part of their obligation under *Eisen IV* to bear the costs of printing and mailing the notice.

Defendants refer several times to the decision in *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969) as authority for their contention that the plaintiffs must bear the costs of identification of class members in all cases. In *Berland* v. *Mack*, *supra*, however, the Court required the defendant, at its expense, to furnish to the plaintiffs a list of the names and addresses of the members of the class. Moreover, it is evident that Judge Mansfield, who issued the decision in *Berland* v. *Mack*, *supra*, did not regard that decision as supporting the defendants' position since he concurred in the decision of the Court below upholding the District Court's determination requiring the Fund to bear the cost of identifying class members in this case.

Defendants' citation of *In re Penn Central Securities Litigation*, 560 F.2d 1138 (3rd Cir. 1977) is also inapposite. The *Penn Central* case involved the question of whether several brokerage houses which held shares for their customers in street name should be reimbursed for their costs in sending a class action settlement notice to the beneficial owners of the stock. The brokers had been directed by an *ex parte* order to forward the settlement notice to their customers. After complying with the order, the brokers sought reimbursement. The District Court, however, denied reimbursement, even for "reasonable postage expenses" which the *ex parte* order had specifically provided the brokers should receive. In reversing the District Court's determination, the Court of Appeals placed great weight upon the fact that the brokers had not been allowed to decide for themselves whether to send the settlement notice to their customers but rather had been directed to do so by the District Court in the *ex parte* order and that they had incurred these costs in complying with said order. In reaching its decision, the Court of Appeals indicated that the issues presented in the *Penn Central* case were quite different from those in the instant case. The Court noted that the instant case dealt with a defendant and its record shareholders rather than non-party brokerage houses who held stock in street name and that, unlike the instant case, the District Court in *Penn Central* had issued its *ex parte* order (which simply directed the brokers to mail the settlement notice to their customers) without any consideration of the discovery rules.[25]

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[34] *In re Memorex Security Cases* 61 F.R.D. 88 (N.D. Cal. 1973) (plaintiffs agreed to pay cost of identifying class members); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969) *reh. denied* 401 U.S. 950 (1971) (information in possession of plaintiffs); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976) (information available from public lists or non-party business organizations); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 278 (S.D.N.Y. 1971) (information in possession of plaintiffs or available from non-party sources).

In the final analysis, defendants, in a vain effort to bolster their position, in effect argue that this Court should reverse the decision of the Court below, not on the basis of the specific facts in this case or the authorities relating thereto, but rather on the bold assumption that class actions are bad, that they serve no useful purpose and that they must be discouraged. In support of this "policy" argument, defendants, relying essentially upon excerpts from a few articles, some of which were written by persons who have frequently represented defendants in class actions, have set forth a one-sided, totally distorted, and largely unfounded description of class actions.

While it is obvious that not every class action which is brought is meritorious or beneficial, it has been well recognized that the class action device serves a very important function in our society and in our judicial system in insuring the effective enforcement of the federal laws including the securities laws, in deterring wrongful conduct, including violations by corporate officials of their fiduciary duties and in vindicating the rights of individuals whose claims are too small to justify separate legal action but which are of a significant size if taken as a group. *See e.g., Eisen IV, supra* (Douglas J., dissenting in part). *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968) *cert. denied*, 395 U.S. 977 (1966); *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir., 1975); *Escott* v. *Barchris Construction Corp.*, 340 F.2d 731 (2d Cir. 1965).

Mr. Justice Douglas, in his opinion, concurred in by Mr. Justice Brennan and Mr. Justice Marshall in *Eisen IV*, made the following statement about class actions:

> "I agree with Professor Chafee that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are

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[25] As noted above, (p. 10) in the instant case, a request for information as to the names and addresses of class members pursuant to the discovery rules (if such information was required prior to giving notice) was orally made by plaintiffs at a conference with the Court in June 1974. Thereafter, the question of whether the names and addresses of class members could be obtained under the discovery rules and the appropriate allocation of the cost of discovering this information was briefed by the parties.

> consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. . . ."
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> "The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth." 417 U.S. at 185-186.

The following observations by Judge Weinstein in the New York Law Journal, May 2, 1972, p.4, Column 3, which were cited by Mr. Justice Douglas in his opinion in *Eisen IV* (417 U.S. at 417 U.S. at 186) are also quite pertinent:

> "Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.
>
> "The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including . . . investors who are victimized by . . . misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

> "When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct."

In *Green* v. *Wolf Corp., supra,* the Court underscored the importance of the class action device in cases involving violations of the securities laws, stating:

> ". . . '[t]he ultimate effectiveness of the federal remedies when the defendants are not prone to settle may depend in large measure on the applicability of the class action device.' 3 Loss, Securities Regulation 1819 (2d ed. 1961)." 406 F.2d at 295.

In *Blackie* v. *Barrack, supra,* the Court also stressed the substantial role played by class actions in deterring violations of the federal securities laws, stating:

> "The availability of the class action to redress such frauds has been consistently upheld . . . in large part because of the substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws". 524 F.2d at 903.

In *Escott* v. *Barchris Construction Corp., supra* the Court said:

> ". . . [T]here is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." 340 F.2d at 733.

Even some of the articles from which the defendants have quoted just excerpts have recognized the important function of class actions. *See, e.g.,* Dam, *Class Action Notice: Who Needs It? The Supreme Court Rev.—1974,* 97, 121 (1975) where the author states:

> "The importance of vindicating small claims should not be underestimated. The law has always considered compensation important, and surely deterrence is one of the main functions of the antitrust, securities, and other laws under which class actions have been frequent. Moreover, the deterrence function is not always adequately performed by public agencies, sometimes because of inadequate public sanctions, sometimes because of the nature of bureaucracies, and sometimes because of meager agency budgets."

See also, Meyer, *The Social Utility of Class Actions,* 42 Brooklyn Law Review 189, 206 (1975) ("In the nine years since Rule 23 has been amended, class actions have proven to be a vital force. During that time society has witnessed an elevation of standards on the part of accountants, attorneys, corporate directors and other fiduciaries, as well as significant advances in the civil rights and environmental law areas. No doubt, much of this is due to forces other than the threat posed by private attorneys general. But, the deterrent supplied by the possibility of substantial monetary liability for overstepping legal bounds may not be gainsaid; nor may the substantial restitution already effected in many class actions be ignored."); and Block, *Class and Derivative Actions Under The Securities Laws* 26 Business Lawyer 425 (1970) ("Corporate management may feel that the class action device serves only to encourage what are called strike-suits. But we are past the point of serious regard for such a view. At this stage in the development of the law, we must recognize that without such a device, genuine wrongs may go unpunished and the law of our time will not permit that result.")

The specific criticisms of class actions made by the defendants in their brief are, also, in the main, either totally unfounded or greatly exaggerated. A comprehensive empirical study of class actions recently prepared at the direction of Senator Warren G. Magnuson for the use of the Committee on Commerce of the United States Senate[24] (hereafter referred to as "Class Action Study") clearly refutes virtually all of the contentions made by the defendants. For example, in discussing defendants' contention that class actions are a form of "legalized blackmail" which are used to force large settlements through the filing of frivolous claims, the Class Action Study stated:

> "Critics have charged that a defendant faced with a class action is forced to settle even if plaintiff's claim is weak. However, defendants in those cases which have been completed evidently preferred initially to press for dismissal or summary judgment and did not feel pressed to settle. . . ."
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> ". . . interviews with defendant attorneys disclosed that no more than a handful would label their opponents' cases as frivolous. If frivolous cases are brought, the high proportion of dismissals or summary judgments indicates that the class action is not a very effective tool for forcing settlements. Moreover, defendant attorneys interviewed indicated that if faced with a weak suit they certainly would fight it on the merits initially before agreeing to settle." (Class Action Study at pp. 9-10)

The Class Action Study also shows that defendants' claim that class actions do not benefit the members of the class because attorneys' fees and other expenses of litigation substantially deplete any recovery and, in addition most class members do not bother to collect their share of the recovery, is also unfounded. First of all, the Class Action Study reveals that in 81% of the cases in which damages had been recovered, recovery exceeded $100,000; in 38% of the cases, damages exceeded $1 million;[27] and in 13% of the cases damages exceeded $5 million. After a careful review of these cases, the Class Action Study concluded that "[t]here is no evidence that class recoveries were depleted substantially by the costs of administering the suit or by attorneys' fees." (Class Action Study at pp. 21, 27). Furthermore, with regard to the distribution of damages, the Class Action Study found that "[t]he problem of unclaimed funds has not arisen in most cases. . . ." The report indicates that in 50% of the cases studied, "all funds designated for class recovery were distributed to the class and in an additional 30% of the cases, "less than 5% of the class recovery was left unclaimed" (Class Action Study at p. 28).

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[24] Senate Committee on Commerce, Class Action Study, 93rd Cong., 2d Sess. (June 1974).

Finally, defendants' contention that class actions impose a heavy burden upon the federal courts is refuted by both the figures compiled by the Administrative Office of the United States Courts and by the aforesaid study conducted for the Senate Committee on Commerce. According to the 1977 Annual Report issued by the Administrative Office

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[27] In several class actions, the benefits to the class have been enormous. E.g., *In Re Equity Funding Corporation of America Securities Litigation*, MDL Docket No. 142 (C.D. Cal. September 29, 1977) (unreported order) (the recovery for the class was approximately $60 million); *In Re Gypsum Cases* 386 F. Supp. 959 (N.D. Cal. 1974) (the settlement fund was approximately $75 million in addition to savings of at least $86 million resulting from the abandonment of the conspiracy by the defendants in the course of the litigation.)

of the United States Courts,[28] class actions filed during the fiscal year 1977 decreased by 10.9% from the prior year and constituted only 2.4% of all civil cases filed during said fiscal year. At the end of fiscal 1977, class actions represented only 4.1% of all civil cases pending. (See 1977 Annual Report, page 121). Furthermore, the Class Action Study, after making an in-depth study of all of the cases filed in the United States District Court for the District of Columbia[29] came to the following conclusion:

> "An examination of the cases filed in the United States District Court for the District of Columbia reveals that class actions have less impact on the court's work load than critics assert and at least in the District of Columbia, class actions do not appear to place an overwhelming burden on the federal district court." (Class Action Study at p. 4).

This study added:

> "It can be said . . . that most class actions do not take marketedly longer from filing to disposition in district court than do civil actions in general." (Class Action Study at p. 12).[30]

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[28] Administrative Office of the United States Courts, 1977 Annual Report of the Director for the Twelve Months Period ending June 30, 1977 (hereinafter referred to as "1977 Annual Report").

[29] At the time this study was made, the United States District Court for the District of Columbia ranked fourth among the 94 districts in the country in the number of class actions pending. (Class Action Study page 3).

[30] The fact that class actions may impose some additional modest burden upon the federal courts surely does not justify, as defendants urge, reversing the decision of the Court below, in order to reduce the number of class actions in the federal courts. As one commentator notes:

"Juxtaposed against the judicial burden created is the more important consideration of class action desirability. If class

See also Note, ***Allocation of Initial Notice Costs Under Federal Rule 23(c)(2),*** 1973 Illinois Forum, 723 (1973), cited by defendants (p. 31), which also specifically rejects the various arguments made by the defendants against class actions generally:

> "The arguments against the public interest benefits of class actions are not convincing in view of the requirements of federal rule 23 and the ultimate benefits of the class action to society. Under rule 23, the trial court must determine whether the suit can be maintained as a class action and can dismiss the suit if it is unmanageable. Since the defendant has an opportunity to argue against the rule 23 motion by contending that the suit is unmanageable, he is not deprived of his constitutional rights if the court decides that the class action can be maintained. If the defendant settles, his decision is a choice not to defend an action which the court, in an adversary proceeding, has decided is maintainable; it is not the result of legalized blackmail. Furthermore, even though a defendant may raise its prices to cover the costs of the settlement, the class action ultimately benefits the consumer through a deterrent effect; industries are encouraged to engage in fair and honest economic practices."

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actions do indeed provide an assessible remedy to the injured and once impotent small claimant, it is hardly a countervailing argument to state that this remedy imposes an additional burden upon the courts. It is precisely for the purpose of adjudicating claims and of providing appropriate remedies that courts have been created; if their workloads become excessive, the solution lies in the allocation to them of more resources, not in the excision of their remedial functions." Meyer, *"The Social Utility of Class Actions,"* 42 Brooklyn L. Rev. 189, 196 (1975).

It is also well to keep in mind that since the federal courts have *exclusive* jurisdiction over various federal substantive laws, including the securities laws, the effective enforcement of these federal laws will be adversely affected, if class actions in the federal courts are substantially curtailed, as defendants urge.

It is evident from the foregoing that defendants' claims regarding class actions are not well founded. While there are certainly imperfections in the class action device, it has been well established that class actions do serve an important function in our judicial system. Accordingly, it would not be appropriate, as defendants urge, to establish a hard-and-fast rule requiring the plaintiff in every case to bear the cost of obtaining information from the defendant as to the names and addresses of class members, for the purpose of discouraging class actions generally. The adoption of such a rule that would adversely affect all class actions, whether meritorious or not, would be akin to the fallacy of—to use a proverbial expression—"throwing out the baby with the bath water." The decision in the instant case, therefore, should not be based, as defendants urge, on specious policy arguments about class actions generally, but rather upon the facts and the law in this case.

The question of whether the plaintiff or the defendant should bear the cost of discovering or obtaining information as to the names and addresses of class members, which, as in the instant case, is in the possession of the defendants, should rest, as it traditionally has, within the sound discretion of the district court. The district court is in the best position to evaluate properly all of the relevant facts and circumstances in each case and to resolve this question in a fair and equitable manner.[31]

The decision by the Court below affirming the District Court's discretionary determination in this case on the basis of the specific record herein, does not create any hard-and-fast rules. It leaves the matter within the sound discretion of the district court to be determined on the basis of the facts and circumstances in each case.[32]

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[31] As noted earlier (pp. 23-24), there is a significant danger that the adoption of an inflexible rule that would deprive the district court of any discretion in the matter would produce inequitable results in cases, particularly where information as to the names and addresses of class members has been computerized by the defendant, or where there are, as in the instant case, special facts and circumstances. *See infra* pages 48-51.

We respectfully submit that the determination by the Court below that the District Court had discretion to require the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes is well supported by the federal rules and by applicable case law, and is fully compatible with the principles set forth by this Court in *Eisen IV*.

POINT II

The District Court Did Not Abuse Its Discretion, Based Upon the Record in This Case, in Requiring the Fund to Bear the Expense of Culling Out the Names of Class Members From Its Computer Tapes.

It is well recognized, as noted earlier, that the district court has broad discretion in matters of discovery, including the allocation of expenses relating thereto, and that the discretionary judgment of the district court should not be disturbed absent a showing of abuse of discretion.[33] (*See*

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[32] There is certainly no reason to believe, as defendants purportedly do, that the district courts, in exercising their discretion, will ignore the legitimate interests of the defendants, or will permit abuses to take place in dealing with the identification of class members or the discovery of computerized information.

[33] In *Brown* v. *Thompson,* 430 F.2d 1214, 1216 (5th Cir. 1970), the Court in reviewing a discretionary determination by the district court in a discovery matter, observed:

> "The judges of the Court of Appeals might well feel that under like circumstances they would have exercised the judicial discretion in a manner different from that in which it was exercised by the trial court. But this is not a basis for reversing the determination of the trial court. The test is whether there has been an abuse of that discretion. . . ."

cases cited, pp. 25-26, footnote 18). Rule 34 of the Federal Rules, which is specifically applicable to the discovery of computerized information provides ample foundation for the District Court's order in the instant case requiring the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. As noted by the Court of Appeals, the 1970 amendments to the Federal Rules rendered Rule 34 specifically applicable to the discovery of computerized information:

> "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data." Advisory Committee Note, 48 F.R.D. 459, 527 (1970). (558 F.2d at 648-49; PA-41a)

It is also well settled, as noted above, that under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data, even though a considerable burden or expense may be involved. If the information sought is relevant, a responding party, under the federal discovery rules, in order to shift the expense to the other side, must show not only that the request for information is burdensome or expensive but that the burden or expense is so excessive as to be unreasonable or oppressive. Specifically, with regard to the obligation of a responding party under the Federal Rules to provide information that is contained in computer tapes, Professors Wright and Miller state, in their well-known treatise:

> "The responding party who is required to prepare a print-out or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.' In many instances the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system." 8 Wright & Miller, Federal Practice and Procedure, § 2218 at 659. (Footnote omitted.)

The Court of Appeals below, while, of course, recognizing that the District Court has discretion under Rule 34 coupled with Rule 26(c) to shift the expense of special computer programming to the discovering party where the demand for information would impose upon the respondent "undue burden or expense," held that the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case.

In reaching this conclusion, which is well supported by the record in this case, the Court of Appeals referred to several factors. First of all, the Court indicated that, although compliance with the District Court's order would require an expenditure by the Fund of approximately $16,000, "we cannot say the burden thus imposed is unreasonable in light of the nature of the information sought

and the extent and character of the fund's business operations" (PA-44a).[34] In contending that the Court of Appeals should not have given any consideration to these factors, the defendants have totally confused the issue. In concluding that the expense involved was not unreasonable, the Court of Appeals did not, as defendants, seem erroneously to suggest, base its determination upon a comparison of the relative resources of the defendant Fund and the plaintiffs. Rather, the Court of Appeals considered whether, in light of the nature of the information sought and the extent and character of the Fund's business operations, the burden of compliance with the discovery demand in this case was excessive.[35] It was surely not improper for the Court of Appeals to have taken into account the foregoing facts in determining whether the District Court had abused its discretion in this case. Defendant's assertion that the Court of Appeals was precluded from considering these factors by *Eisen IV* is completely unfounded.

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[34] In reaching this conclusion, the Court of Appeals noted that the cost to the Fund (which has net assets in excess of $500,000,000) of identifying the names and addresses of each present or former shareholder who is a member of the class, was only $.13. The Court further noted that computers may occasionally make information more difficult to discover, that even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used, and that it was scarcely unreasonable to demand of a respondent that it employ its computer resources to provide discoverable information of a relatively simple nature where, as in the instant case, the respondent Fund makes extensive use of computers in the operation of its business.

[35] In this connection, the Court of Appeals also observed:

> "There is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple. Great corporations, for example, must expend millions to provide to the government information necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars." (558 F.2d at 650; PA-44a-45a).

As indicated by the Court of Appeals, the order of the District Court allocating the costs of discovery of the computerized names and addresses of the class members was not unreasonable, moreover, in light of the District Court's definition of the class as sought by the defendants.

The plaintiffs had sought to re-define the class to exclude former shareholders of the Fund, which would have obviated the need for culling out the names and addresses of class members from the Fund's computer tapes and would have allowed the individualized notice mandated by *Eisen IV* to be inserted, at small expense, in one of the Fund's regular mailings.[36] The defendants, however, opposed the class re-definition, presumably because it would limit the *res judicata* effect of this action,[37] and defendants also op-

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[36] The modification sought by plaintiffs would also have simplified the issues in the case since the defendants had alleged that they were entitled to a set-off against those persons who had purchased shares of the Fund in the class period but, thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the Fund's portfolio. See page 7, *supra*. In this connection, the Court of Appeals noted in its opinion that "the issues presented might have been somewhat different for those who had sold their shares than those who were still shareholders; the members of the former group might not have been damaged by the alleged overvaluation of the Fund's net assets." (PA-45a).

[37] As noted above, since defendants themselves had sought to limit the scope of the class in certain other respects, it may well be that defendants, in opposing the redefinition of the class proposed by plaintiffs were principally interested in increasing the expenses involved in connection with giving notice to the class in the hope that the District Court would impose these added expenses upon the plaintiffs and that this would prevent the action from proceeding as a class suit. See page 9, *supra*. It is also interesting to note that, on one hand, defendants contend in their brief (p. 31) that a larger class may have been preferable in the instant case

posed the proposed method of notice, on the ground that the proposed notice to all the Fund's shareholders would allegedly prejudice the Fund by notifying the shareholders of the Fund not involved in the litigation.[38]

The District Court agreed to have the class defined and notice given in the manner requested by the defendants, thereby necessitating the added cost of discovering the names and addresses of class members from the Fund's computer tapes, which cost the District Court required the Fund to bear, stating that:

> "*Moreover,* with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and *it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense.*" (Emphasis added). (20 F.R.Serv. 2d at 1221; PA-6a).

Notwithstanding the foregoing express statement by the District Court, the defendants argue that, since the District Court rejected the plaintiffs' proposed redefinition of the class, the District Court, in allocating this added cost of discovery, should not have taken into account the fact that this added cost was attributable to the defendants' request with regard to the definition of the class. What the defendants clearly ignore is that the District Court's

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in order to reduce the possibility of "repetitive litigation" and, yet, on the other hand, defendants themselves had sought to restrict the scope of the class and assert also in their brief (p. 31) that there was only "slight" likelihood of subsequent claims being filed if the class had been reduced as proposed by plaintiffs.

[38] See discussion of facts relating to defendants' opposition to proposed method of notice on pages 9-10, *supra*.

rulings in this case with regard to the definition of the class, the method of giving notice and the allocation of the costs of culling out the names of class members from the Fund's computer tapes were obviously interrelated[39] and reflect the District Court's considered judgment as to a fair overall disposition of this matter, taking into account the respective positions and proposals urged by the parties with respect to these matters. The District Court could have defined the class as proposed by the plaintiffs, consistent with the principles of Rule 23,[40] but determined instead, in the exercise of its discretion, to grant the defendants' request with regard to the definition of the class and to require defendants to bear the additional discovery expenses involved in defining the class as sought by them. It is evident from a fair reading of the entire opinion of the District Court that the District Court took into account the "partisan demands" of the defendants in deciding upon the definition of the class and in determining to require the Fund to bear the additional expenses involved in culling out the names of class members from its computer tapes.

None of the cases cited by the defendants dealing with the discovery rules (most of which focus on Rule 33, which as the Court below indicated, unlike Rule 34, "was not especially tailored to the discovery problems posed by contemporary computer technology," [41] (558 F.2d at 649; PA-42a) shows that the District Court abused its discretion in this case in refusing to shift the burden of the expense involved in identifying class members from the Fund to the plaintiffs. For example, in *In re Nissan Motor Corp., Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), which is relied upon heavily by defendants, the information as to the names and addresses of class members was not contained in computer tapes, as in the instant case, but rather in the defendants' ordinary business records. Indeed, in reaching its decision, the Court in *Nissan* carefully distinguished the decision in *Foster* v. *Maryland State Sav. and Loan Ass'n.*, 1974-2 CCH Trade Cases ¶75,277 (D.D.C. 1974), where the defendant was required to bear the cost of providing the names and addresses of class members on the ground that, in *Foster*, the names and addresses of the class members were contained in the defendant's computer tapes. Furthermore, in *Nissan*, unlike the instant case, the defendants had not sought to have the class defined in a manner that necessitated the expense of obtaining information as to the specific names and addresses of class members.

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[39] The interrelationship of the District Court's rulings in this case is further evident from the fact that, after referring to defendants' objections to sending the notice to all current shareholders of the Fund, the District Court stated:

> ". . . My solution to this problem starts with my earlier ruling that it is the responsibility of defendants to cull out from their records a list of all class members and provide this list to plaintiffs' (20 F.R.Serv.2d at 1222; PA-8a).

[40] In this connection, the Court of Appeals stated:

> "The considerations advanced by the defendant in opposition to plaintiffs' proposed class redefinition were undoubtedly entitled to some weight; still, they did not *require* the class definition ultimately accepted by the district court. *See Eisen IV*, 417 U.S. at 179 n.16 and *Eisen III*, 479 F.2d at 1023 (Oakes, *J.*, dissenting from denial of rehearing en banc) (raising possibility that class may be divided into subclasses pursuant to Rule 23(c)(4) so as to minimize cost of notice borne by representative plaintiff). *Cf. Eisen III*, 479 F.2d at 1009 n.5 (suggesting that notice may be included in regular mailing by defendant to class members)." (Emphasis supplied by the Court.) (558 F.2d at 651; PA-46a).

See also, Dolgow v. *Anderson*, 43 F.R.D. 472, 498 (E.D.N.Y. 1968) (indicating that if notice to those persons who are no longer stockholders of defendant Monsanto would create a problem, "it might be necessary to limit the classes to include only those who could be provided with notice from current Monsanto shareholder lists"); *State of Illinois* v. *Harper & Row Publishers*, 301 F.Supp. 484, 494 (N.D. Ill. 1969) (granting class certification notwithstanding the fact that "the restriction of the classes' scope appears arbitrary"); and *Zachary* v. *Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971); *Dolgow* v. *Anderson, supra*, at 500, and *Popkin* v. *Wheelabrator-Frye, Inc.* [1974-1975 Transfer Binder], CCH Fed. Sec. L. Rep. ¶ 95,068 (S.D.N.Y. 1975) (approving insertion of notice in a regular mailing by a corporate defendant to its stockholders in order to reduce the cost of giving notice to the class).

With respect to the method of giving notice proposed by the plaintiffs, the Court below also noted in its opinion that "under Rule 23(c)(2) the district court could have supervised the form of notice included in one of the Fund's regular mailings, so as to avoid undue prejudice to the Fund," and that "[i]n any event the Fund has already notified its shareholders on many occasions of the pendency of this litigation." (PA-46a). *See also, Miller* v. *Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971), which was cited with approval in *Eisen IV*, where the Court rejected a claim by the defendant that sending a class notice to the shareholders of the defendant who had already been apprised of the litigation in prospectuses and letters sent by the defendant to them would "seriously injure the financial position" of the corporation.

[41] The Court below noted that ". . . the draftsman of Rule 34 chose—wisely, in light of the relative judicial inexperience with the discovery problems posed by computer technology—not to burden discovery of computerized information with the more rigid principle of Rule 33(c)." (558 F.2d at 650; PA-43a-44a)

The cases cited by defendants do not set forth any hard-and-fast rules with regard to the allocation of discovery expenses. Rather, the cases indicate that the matter is to be determined within the discretion of the District Court based upon the facts and circumstances presented by the particular case. In the instant case, as the Court of Appeals observed, "the order of the district court accommodated the competing interests in a manner which was fair and imaginative." (558 F.2d at 651; PA-46a)

We respectfully submit that the District Court, based upon the record in this case, did not abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes.

POINT III

Even If the Cost of Identifying the Class Members Must Be Regarded as a "Notice Cost", Under *Eisen IV*, the District Court Did Not Commit Reversible Error in Imposing This Cost Upon the Fund in This Case, Since the District Court May Properly Impose Notice Costs Upon a Defendant Where, as in This Case, a Fiduciary Duty Pre-existed Between the Plaintiff and Defendant and, in Addition, There Were Special Facts and Circumstances Present That Made the Application of the "Usual Rule" Regarding Payment of "Notice Costs" Inappropriate.

Since the Court below found that the cost of culling out the names and addresses of class members from the Fund's computer tapes was in the nature of a discovery expense, rather than a "notice cost", the Court below did not have to reach the issue of whether "notice costs" may properly be imposed upon the defendant where a fiduciary duty pre-existed between the plaintiff and defendant and where, in addition, there are special facts and circumstances present that make the application of the "usual rule" inappropriate.

We submit, however, that Judge Hays correctly stated, in his dissent to the panel's decision, that, under such circumstances, the "usual rule" need not be applied, and that assuming, *arguendo*, the cost of identifying the class members must be regarded as a "notice cost" under *Eisen IV*, the District Court could properly impose said "notice cost" upon the defendants in this case.

Both the Court of Appeals in *Eisen III* (479 F.2d at 1009, n. 5) and this Court in *Eisen IV* noted that the usual rule that the plaintiff must bear the cost of notice may not apply "where a fiduciary duty pre-existed between the plaintiff and the defendant, . . ." *Eisen IV*, *supra*, at 178. The defendants, while recognizing this possible exception to the usual rule, have construed this exception so narrowly as to make it essentially meaningless, and have also based their contention that this exception should not apply in this case upon certain erroneous factual assumptions. The defendants argue that this exception should be limited to situations where the defendant is essentially in the position of a corporation in a shareholder's derivative suit. In *Eisen IV*, however, this Court cited *Dolgow* v. *Anderson*, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968), as an example of a case that might present such an exception to the usual rule. See *Eisen IV, supra,* 178, fn. 15. In *Dolgow,* the defendant clearly was not in the position of a corporation in a derivative suit. Indeed, in *Dolgow,* which, like the instant case, was a class action brought by plaintiffs on behalf of purchases of securities, the defendants were in essentially the same position as the defendants in the instant case. In the portion of the opinion in *Dolgow* specifically cited by this Court in *Eisen IV,* the Court indicated that a defendant corporation may be required to bear the cost of notice based upon the "fiduciary duty owed to purchasers of stock by the corporation. . . ." *Dolgow, supra,* at 498.

It may be noted, in passing, that the grounds referred to by the Court in *Dolgow,* in the portion of the opinion in *Dolgow* specifically cited by this Court in *Eisen IV,* as providing a basis for requiring the defendant corporation to pay the cost of notifying the members of the class, e.g., the fiduciary duty between the defendants and the plaintiff class, and the advantages to the defendants of a judgment with *res judicata* affect against the class, are present in the instant case.[42] The Fund, as indicated below, clearly

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[42] It should be noted that while the Court in *Dolgow* was discussing the question of whether the aforementioned grounds justified imposing the entire cost of notice upon the defendants, in the instant case, all that the District Court has required the Fund

has a fiduciary obligation to the members of the class, and the class has been defined, as requested by the Fund and the other defendants to include persons who are no longer shareholders of the Fund so that the defendants will have the advantage of a judgment with broader *res judicata* effect.

It is evident that neither this Court in *Eisen IV* nor the Court of Appeals in *Eisen III,* in noting that the usual rule requiring the plaintiff to bear the cost of notice under Rule 23 may not apply "where a fiduciary duty pre-existed betwen the plaintiff and the defendant", could have intended to limit the fiduciary relationship exception to situations involving shareholder's derivative suits, since a shareholder's derivative suit is not even a class action under Rule 23, but rather is covered by Rule 23.1, which does not require that a notice be sent out, comparable to the notice required by Rule 23(c)(2) apprising shareholders of the pendency of the action and the right to opt out. Rule 23.1, on the contrary, requires that notice be sent out only in connection with a dismissal or compromise of the action.

There can be no doubt that there was a fiduciary relationship between the plaintiffs and the defendants in the instant case. Indeed, Congress has, in the Investment Company Act, imposed fiduciary duties of the highest order upon the defendants to the plaintiffs and the class. In this con-

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to bear is the cost involved in culling out the names of class members from the Fund's computer tapes, a cost that has been necessitated by the defendants themselves. The District Court has required the plaintiffs to pay all of the costs of preparing the notice and any extra costs of mailing involved in sending out the notice, separately or in a regular mailing of the Fund to the class members, including the cost of segregating the envelopes going to the class members and the envelopes going to other shareholders. In addition, under the District Court's decision, the plaintiffs will bear the full cost of sending out the notice to those members of the class who were no longer shareholders of the Fund.

nection Judge Hays, in his dissenting opinion to the panel's decision, stated:

> "Unquestionably the relationship between the Fund shareholders and the defendants herein is of a fiduciary nature. As one court has observed, the Investment Company Act 'impose[s] fiduciary obligations of the highest order upon persons who control investment companies.' *Securities and Exchange Commission* v. *Advance Growth Capital Corp.*, 470 F.2d 40, 55 n.21 (7th Cir. 1972). *See,* Investment Company Act of 1940, 15 U.S.C. §80a-35. So too, '[t]he Investment Advisors Act of 1940 . . . reflects a congressional recognition "of the delicate fiduciary nature of an investment advisory relationship. . . ."' *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191 (1963), *quoting* 2 Loss, Securities Regulation (2d ed. 1961) at 1412. It is the breach of these fiduciary duties which is at the core of this suit." (558 F.2d at 646; PA-30a-31a)

The defendants, nevertheless, contend that the fiduciary relationship between the parties herein should be disregarded and that the "usual rule" should be applied in the instant case, based upon two grounds, both of which, we submit, are unfounded. First, the defendants assert that certain considerations pointed to in justification for shifting the cost of notice from the plaintiff to the defendant in *Dolgow,* such as the strength of plaintiff's case and the ability of the defendant to bear the costs, have been subsequently held to be inappropriate. It does not follow, however, simply because it has been determined that *these* considerations do not justify imposing the cost of notice upon the defendant, that other considerations, such as the existence of a fiduciary relationship between the plaintiffs

and the defendants, which both *Eisen III* and *Eisen IV* have indicated may justify the imposition of notice costs upon the defendants, should be disregarded.[43] The inevitable result of the approach urged by the defendants herein would be the creation of an inflexible rule that the plaintiff in a class action must pay the cost of notice, irrespective of legitimate considerations, like those in the instant case, which *Eisen III* and *Eisen IV* have indicated may properly influence the court in determining who should bear the cost of notice.[44]

The defendants also base their claim that the fiduciary relationship exception should be disregarded and the usual rule should apply in the instant case upon the mistaken assumption that the Fund is not a party to the class action claims and has no direct interest in the outcome of said claims. The defendants conveniently ignore the facts that the defendants other than the Fund have asserted cross-claims against the Fund in their amended answers, alleging that, if they are liable to the class by reason of the overvaluation of restricted securities in the portfolio of the Fund, then the Fund is liable to them to the extent that the Fund has received funds from the class by reason of such overvaluations (A-67, A-89-90).[45] Thus, contrary to the defendants' contention, the Fund does have a direct interest in the outcome of the class action claims.[46]

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[43] Defendants argument would seem to suggest that the reference in *Eisen IV* to *Dolgow* as an example of a case that might present an exception to the usual rule was meaningless.

[44] We do not contend that the district court *must*, in all cases where there is a fiduciary relationship between the defendants and the plaintiff class impose the cost of notice upon the defendants. There need not be a rigid rule. The district court, however, should have the power in those cases *not* covered by the "usual rule", such as where the defendants have a fiduciary duty to the plaintiff class, to determine the proper allocation of the costs of notice. In this connection, we note that the instant case is a particularly appealing one for not applying the usual rule since the fiduciary duty involved in this case is of the "highest order", and, in addition, there are special facts and circumstances involved in the case, i.e. the added cost of identifying the class members was necessitated by the defendants' request with regard to the definition of the class, which further justified departing from the usual rule.

The reasons for not applying the usual rule in cases like the instant one, where a fiduciary relationship exists between the defendants and the plaintiffs were cogently set forth by Judge Hays in his dissent from the panel decision, as follows:

> "When the defendants assumed their positions with the Fund they knew, or clearly should have known, that the law imposes very strict standards upon their conduct. Their relationship to the plaintiff class is one of trust; the entire scheme of our investment company and advisor regulation is predicated upon that trust being respected inviolate. A breach of a fiduciary duty traditionally has been considered a much graver transgression than, for example, breach of a contractual duty . . . . In cases involving fiduciaries, . . . the usual rules traditionally have been modified to insure that the trust relationship is not abused.

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[45] It is also evident that while the plaintiffs demanded damages from the Manager and the directors rather than the Fund, the complaint does allege a violation of fiduciary duty by the Fund to the plaintiffs and the class, since the Fund is alleged to have issued false prospectuses and reports, to have improperly valued restricted securities in the Fund's portfolio, and to have sold shares of the Fund to the plaintiffs and the class at inflated net asset values. (A-24-28).

[46] Defendants also suggest that requiring the Fund to bear the costs involved "may well be unfair to shareholders that have not joined the class" (Petitioners' Brief, p. 36). It is reasonable to assume in this case, however, that a majority of the Fund's shareholders would approve of the Fund's bearing these expenses, since approximately 60% of the Fund's shareholders are members of the class (A-145, PA-5a, 38a).

> The norms appropriate in the context of arms-length bargaining are simply inapposite in the fiduciary context. Thus, the usual rule should not apply to preclude class action when to do so creates a serious potential for insulating fiduciary breaches from redress." (555 F.2d at 646 PA-31a)

In *Eisen III*, which was affirmed by this Court in *Eisen IV*, the Court noted that justification may exist for holding that the plaintiff is not obligated to bear the cost of notice where there are special facts and circumstances involved in the case.[47] In the instant case there were special circumstances present, i.e. the added cost of identifying the class members was necessitated by the defendants' request with regard to the definition of the class,[48] which provided further justification (in addition to the existence of the fiduciary relationship between the defendants and the plaintiffs herein) for departing from the usual rule in this case.

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[47] *The Court stated in Eisen III:*

"Nor did we decide or intend to say [in *Eisen II*, 391 F.2d (2d Cir. 1968)] that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. This is an action to recover money damages for alleged violations of Section 4 of the Clayton Act and Section 6 of the Securities and Exchange Act of 1934. It is not a derivative stockholder's action asserting a cause of action in favor of a defendant corporation, which regularly sends communications to all the stockholders and may be said to owe its stockholders certain fiduciary duties, nor a case where a public utility corporation which regularly sends monthly bills to its current customers has been held to have overcharged its customers and the class suit is brought to compel a refund. There may be other similar examples of class actions in which, *depending on the circumstances of particular cases, courts might find justification for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration.* It must be recalled that the provisions for notice in amended Rule 23 were intended to comply with constitutional requirements. *See* Advisory Committee's Note, 39 F.R.D. 69, 107." (Emphasis Supplied) 479 F.2d at 1009, fn. 5.

[48] See discussion at pp. 48-51 supra.

We respectfully submit, in light of the foregoing, that even if the cost of identifying the class members was a "notice cost" that the district court could properly impose this cost upon the Fund, in the instant case, and that it did not commit reversible error in doing so.

CONCLUSION

The Judgment of the Court of Appeals for the Second Circuit Should Be Affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1977

No. 77-335

Oppenheimer Fund, Inc., Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy, Jack Nash, Edmund T. Delaney and Emanuel Celler,

Petitioners,

v.

Irving Sanders, Egon Taussig, Michael Shaev and Rita Shaev,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

February 24, 1978

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IN THE

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OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Preliminary Statement

Pursuant to Rule 40 of this Court, petitioners ("defendants") submit this reply to the brief of respondents ("plaintiffs").

The question to be decided is whether in a class action under Rule 23(b)(3),[1] any of the defendants can be required to bear the expense of special programming required to identify and assemble the names and addresses of the members of the class that plaintiffs propose to

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[1] "Rule . . ." refers to the Federal Rules of Civil Procedure.

represent and to whom the initial class notice required by Rule 23(c)(2) is to be sent.

Plaintiffs urge that this expense was properly imposed on defendant Fund on the basis of three principal arguments, all of which we submit are entirely lacking in merit.

1. Underlying all of plaintiffs' arguments is the erroneous premise that identification of the names and addresses of class members for class notice purposes is not an integral part of the notice procedure and therefore the decision of this Court in *Eisen IV*[2] is inapplicable.

2. Plaintiffs place their major emphasis on attempting to establish that the District Court had discretion under the Federal discovery rules to impose this expense on defendant Fund, despite *Eisen IV*, and even though the decision as to this expense was not made in connection with any proceeding under the discovery rules, which, if applicable, would not authorize shifting the expense to the Fund.

3. Plaintiffs also contend that if *Eisen IV* were applicable and would usually require plaintiffs to bear the expense, this case should be deemed an exception for two reasons: (1) defendants' opposition to plaintiffs' combined proposal for broadcast mailing and class reduction; and (2) the purported fiduciary relationship between the Fund and plaintiffs—factors which in the circumstances here present have no bearing on the question of proper allocation of notice costs.

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[2] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

I.

Ascertaining the Names and Addresses of Class Members Is an Integral Part of Satisfying the Notice Requirements Under Rule 23(c)(2) and the Costs of Doing So Must Therefore Be Borne by Plaintiffs Under *Eisen IV*. Plaintiffs' Contentions to the Contrary Are Fallacious.

In *Eisen IV*, this Court held that in the usual class action, plaintiffs must bear the costs of notifying class members under Rule 23(c)(2).

The notice required by Rule 23(c)(2) involves at least eight essential components, including ascertaining the names and addresses of class members, marking them on the envelopes into which the notice will be stuffed, and affixing postage on these envelopes. (Petitioners' Brief, pp. 26ff).[3] A substantial majority of relevant cases have treated the process of identification as an integral part of the notice process.[4] Indeed, the specific language of the Rule itself concerning notice points to the same conclusion in requiring "individual notice to all members who can be

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[3] Petitioners' Brief and Respondents' Brief will be cited as "Pet. Br." and "Resp. Br."

[4] Plaintiffs misconstrue (at Resp. Br. pp. 32-33) the cases cited by defendants (at Pet. Br. p. 26) for the proposition that a substantial majority of cases regard identification as part of notice. That some of these cases allocated identification costs to defendants does not mean that identification was treated as separate from notice. A number of the cases preceded *Eisen IV*, and some courts then assumed they had discretion to allocate between plaintiff and defendant any notice costs, including identification costs. Contrary to plaintiffs' implications (Resp. Br. pp. 32-33), a number of post-*Eisen IV* cases have regarded it as plaintiffs' obligation to pay the expense of class member identification. See *e.g.*, *Popkin* v. *Wheelabrator-Frye, Inc.*, 1975-6 CCH *Fed. Sec.L.Rep.* ¶ 95,411 (S.D.N.Y. 1976); *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977).

identified through reasonable effort." (Emphasis supplied). As was properly observed by the dissent below, "Notification posits identification which is an inseparable part of the process." 558 F.2d at 652; PA-50a.

Plaintiffs have no adequate reply to any of the foregoing. Instead, they urge that *Eisen IV* applies or should apply only to a fraction of all notice costs (which in this case would be a minor portion of the total), stating (at Resp. Br. p. 22): "Indeed, *Eisen IV* did not even deal with the question of allocating the costs of obtaining information as to the names of class members." Any such restrictive reading disregards the entire thrust of the decision that plaintiffs must pay all expenses of the notice process, including those relating to identification of class members. Thus this Court declared that "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit" (417 U.S. at 179), and that "[i]n the absence of any support under Rule 23, [plaintiff's] effort to impose the cost of notice on [defendants] must fail." (417 U.S. at 178).

Similarly erroneous is plaintiffs' reading of the recent Fifth Circuit decision, *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), in which they urge that this decision did not establish a rule requiring plaintiffs to bear the expense of identification.[5] (Resp. Br. p. 31). Their contention ignores *Nissan*'s statement at 552 F.2d at 1102:

> "Upon commencing a class action, the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class members as well as paying the costs of their individual notice."

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[5] Plaintiffs also misread *Nissan* as applying discovery rules in connection with Rule 23 matters (Resp. Br. p. 31). In fact, *Nissan* rejected any such application of those rules. See Pet. Br. p. 46.

Plaintiffs suggest that identifying and assembling the names and addresses of class members may be distinguishable from other aspects of notice on the grounds that access to material concerning identification is controlled by defendants while the preparation and mailing of a notice is controlled by plaintiffs (Resp. Br. pp. 23-4). This purported distinction is beside the mark. Control of access has no bearing on who properly should bear the expense of acquiring the information. Plaintiffs would confuse who may best arrange for a task to be done with who should pay for it.[6]

Perhaps in recognition of the irrelevance of this distinction, plaintiffs then attempt to justify abandonment of *Eisen IV* on the hypothetical basis that there is "a significant *potential* for abuse" by whoever controls access. (Resp. Br. p. 24). This "potential" for abuse is of the same spurious quality as the "potential" issue upon which the en banc decision sought to justify application of the discovery rules. (See Pet. Br. p. 50). There is not even a scintilla of evidence in this case of any such abuse by defendants or any attempt on their part to obstruct access to shareholder records; nor do plaintiffs make such a claim. On the contrary, defendants have been and remain fully willing to have the tasks needed to identify class members performed by its transfer agent at plaintiffs' expense. As the dissent below noted (558 F.2d at 653; PA-52a):

> "The raw tape data from which the proper list can be ascertained is fully available to the plaintiffs. The

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[6] See Comment, "Allocation of Identification Costs In Class Actions: *Sanders* v. *Levy*," 91 Harv. L. Rev. 703, 712 (1978): "[T]he question of which party has the easiest task of gathering the [identification] information is relevant to the question of who should perform the task *but not always relevant to the question of who should pay for its performance.*" (Emphasis supplied.)

> only issue is who is to pay the expense of the special programming necessary to make it usable."

Moreover, if there should be obstruction or other abuse, the District Court has ample authority to devise appropriate sanctions. See *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974).

Plaintiffs present no sound basis for excluding the costs of class member identification for the purpose of giving notice under Rule 23(c)(2) from the salutary rule of *Eisen IV* that all notice costs are to be borne by plaintiffs if they wish to obtain the advantages of a class action. Nor is such exclusion warranted by consideration of policy factors relating to class actions. As was emphasized by the comments of numerous respected practitioners and such distinguished jurists as Judges Medina, Friendly and Weinfeld (Pet. Br. pp. 37-44), class actions are not an unmixed blessing. Similarly, Judge Wyzanski has referred to the overburdening of his court by "frivolous 'class suits.'" *Dionne* v. *Springfield School Committee,* 340 F.Supp. 334, 335 (D. Mass. 1972). Plaintiffs may claim that these comments present a "largely unfounded description of class actions" (Resp. Br. p. 35) only by disregarding the realities of class action practice and the increasingly heavy burdens class actions impose on the courts as disclosed by statistics from the Administrative Office of the United States Courts.[7]

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[7] The "comprehensive" study on which plaintiffs rely to refute defendants' criticisms of class actions, the "Class Action Study" (see Resp. Br. pp. 39-41), fails to do so. The Study rests on statistics pertaining to relatively few cases and does not, of course, cover recent developments after publication, during the last 4 years. Among other things, the Study is unreliable concerning the impact of litigation expenses on the amounts of class recoveries, since in most of the cases studied, plaintiffs did not incur notice expenses, and where they did, the expenses were minimal. (Class Action Study, pp. 15-17).

We submit there is no sound basis for attempting to fragment the integral components of the notice process. To do so will not only dilute *Eisen IV* but ultimately will lead to the result that defendants will in substantial part be financing suits against themselves—a result which *Eisen IV* does not countenance.[8]

II.

In the Circumstances Here Present, the District Court Did Not Have Discretion Under the Discovery Rules to Depart From the Rule of *Eisen IV*.

In *Eisen IV*, this Court held: "In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail." (417 U.S. at 178). Plaintiffs here, having been no more successful than the *Eisen* plaintiff in finding support under Rule 23, have looked

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The Study, which was prepared by students for the Georgetown University Law School Law Journal for publication in 1974, and reprinted in H. Newberg, *Class Actions*, Vol. 5, Appendix to Chapter 27, p. 1442 *et seq.* (McGraw-Hill 1977), contains a "national" segment based on responses to questionnaires pertaining to a limited number of cases, and a District of Columbia segment, also analyzing a limited number of cases. Although not noted by plaintiffs, conclusions drawn in each segment of the Study sometimes rest on data pertaining to substantially fewer than the total number of cases involved in the segment. Plaintiffs also repeatedly fail (at Resp. Br. pp. 39-40) to note from which segment they are deriving their excerpted conclusions and statistics.

[8] Where there is scant likelihood that defendants, even if they prevail, will be reimbursed for the expenses of identification, imposing that burden on them raises a due process issue. See Pet. Br. pp. 24-25, especially at fn. 17. See also Comment, *supra,* 91 Harv.L.Rev. 703, 711 (1978):

> "Absent some meaningful guarantee of reimbursement by plaintiffs, which will vary with the facts of each case, a due process problem might be raised if defendants were required to pay identification costs, thereby, in effect, financing the class action against themselves."

elsewhere and purport to find support in discovery Rules 26 and 34. For reasons set forth at Pet. Br. pp. 44-62, the discovery rules should not be misapplied as plaintiffs here propose.

1. Plaintiffs did not follow the procedures required to invoke the federal discovery rules to obtain the names and addresses of class members, despite plaintiffs' contentions to the contrary (Resp. Br. pp. 10, 34), and the District Court did not purport to act pursuant to these rules in ordering the Fund to pay the costs of identification. Instead, the issue of who was to pay these costs arose in connection with plaintiffs' motion for class certification under Rule 23(c)(1); and both the District Court and plaintiffs viewed the question of identification costs as one arising under Rule 23.[9]

2. Even if the issue of discovery were not precluded from consideration because not properly raised in the District Court,[10] the names and addresses of class members are not discoverable by plaintiffs for the purpose of giving notice under Rule 23. The fundamental reason is that plaintiffs do not seek information or knowledge as required by Rule 26(b)(1). On the contrary, they seek only to have the Fund pay for the transfer agent's extensive services (as

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[9] Thus, at Record Document, No. 94 (at p. 11), referred to by plaintiffs at Resp. Br. p. 10, fn. 4, plaintiffs asked the District Court to impose the expense of identification on defendants in their class certification motion *under Rule 23*. Further, as the dissent below noted:

> "The plaintiffs have never sought discovery relief under Rule 34. In the memoranda submitted by the plaintiffs to Judge Griesa prior to his opinion below there is no mention of Rule 34. Judge Griesa expressly and correctly perceived the issue as being 'who is to bear certain expenses in connection with the giving of notice.' *Sanders* v. *Levy*, 69 Civ. 1242, Slip op. at 2 (S.D.N.Y. May 15, 1975)." 558 F.2d at 653; PA-51a.

[10] See *In re Penn Central Securities Litigation*, 560 F.2d 1138 (3rd Cir. 1977).

described at Pet. Br. p. 8) in providing the addresses to be affixed to the envelopes transmitting the class action notice to members of the class. There is no basis for believing that plaintiffs or their attorneys would even look at, let alone require knowledge of, those 121,000 names and addresses.

Plaintiffs' contention that the inapplicability of discovery to class member identification would make discovery inapplicable to other matters germane to the requirements for maintaining a class action suit under Rule 23 is fallacious. Information about such other matters as the numerousness of the class, the existence of common questions of fact and law and their predominance over individual questions may be discoverable precisely because these are matters which must be established if the class action is to be maintained. Similarly, information may be required regarding the nature of the best notice practicable so that the court may determine the extent of the effort required for notice to class members. While discovery for these purposes may be in compliance with the requirements of Rule 26, not so is the attempted use of discovery for the purpose of shifting the costs of the basic task of notice assigned to plaintiffs under Rule 23. Nor is there justification for resort to fanciful "issues" that are artificially created by superficial reasoning of the type that the dissenters characterized as "an exercise in sophistry." 558 F.2d at 653; PA-51a.[11]

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[11] To the extent *Chevalier* v. *Baird Savings Ass'n*, 72 F.R.D. 140 (E.D. Pa. 1976), would permit the imposition of identification expenses on defendants in class actions, it appears to conflict with a decision in the same district, *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 359-360 (E.D. Pa. 1976). The issue of expenses did not arise in *Burstein* v. *Slote*, 12 F.R. Serv.2d 577 (S.D.N.Y. 1968), where the issue of identification arose in connection with an oral deposition. Both decisions appear to have been wrongly decided insofar as they permitted discovery of the names and addresses of class members.

The efforts of plaintiffs and of the en banc majority to press for a more expansive reading of the discovery rules fly in the face of the ever-mounting concern of the Bench and the Bar with respect to the excessive latitude of the present discovery rules and procedures. Thus this Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741-2 (1975), warned of the "threat of extensive discovery" which in and of itself may force settlements and the "potential for possible abuse of the liberal discovery provisions" which may "exist in this type of case [i.e. securities litigation] to a greater extent than they do in other litigation." Similarly, the Attorney General of the United States has recently articulated his views "that a high priority should be given to eliminating abuses in the use of pretrial discovery procedures. . . ." Bell, "The Pound Conference Follow-Up: A Response From The United States Department of Justice," 76 F.R.D. 320, 328 (1978).[12]

3. Even if the discovery rules were applicable, the only relevant rule is Rule 33(c), which was designed to deal with the type of situation here present, where the burden of deriving the names and addresses from the existing material is essentially the same for both sides. Where, as here, defendants freely permit plaintiffs to have access to the relevant material, Rule 33(c) requires plaintiffs to bear the expenses involved in such derivation. Plaintiffs' repeated reference to the discretion of the District Court cannot disguise or justify the Court's failure to apply the principle embodied in Rule 33(c). Nor can plaintiffs' belated resort to Rule 34 disguise the fact that Rule 34 does not and was never intended to require the production of the material sought by plaintiffs, which does not yet exist and must first be created by extensive and painstaking effort. (See Pet. Br. pp. 53-62). Nothing in Respondents' Brief warrants a contrary conclusion.

4. Plaintiffs' attempt to evade the requirements of Rule 23 by resort to the discovery rules was the subject of cogent comment in the dissent below, which merits repetition:

> "In *Eisen IV* the Court stated, 'The usual rule is that a plaintiff must initially bear the cost of notice to the class.' *Id.* at 178. . . . [T]he majority has decided that obtaining the names and addresses of the prospective class is not part of the notification process mandated by Rule 23(c)(2) but is rather within a discovery process governed by an amalgam of Rules 26(b)(1) and 34. As a matter of logic this is bewildering. The only purpose of the plaintiffs here in obtaining the data is to notify the class; it is an essential and unavoidable step in the notice giving process. . . . The majority now creates in effect a bicephalous rule which is anomalous. . . . As *Eisen IV* held, 'the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.' 417 U.S. at 179, 94 S. Ct. at 2153. We cannot appreciate how it can be reasonably held that the expense incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice." 558 F.2d at 652; PA-48a-49a.

It was in the light of this sound analysis that the dissenters below rejected the claims that *Eisen IV* supported the views of plaintiffs and the en banc majority, and stated: "We can only conclude that the majority while purporting to follow *Eisen IV* is in fact *flouting* its holding." 558 F.2d at 653, PA-52a. (Emphasis added).

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[12] The Attorney General further stated (at 76 F.R.D. 329): "The Office for Improvements in the Administration of Justice is studying the problems raised by class actions and developing proposals for remedying the more serious difficulties which arise under F.R. C.P. 23(b)(3)." Several of those difficulties are specifically discussed. See also Lundquist and Schechter, "The New Relevancy: An End to Trial by Ordeal," 64 A.B.A. Journal 59 (January 1978); Erickson, "Responses of the American Bar Association to the Pound Conference," 64 A.B.A. Journal 49, 52 (January 1978).

III.

There Are No Special Circumstances Here Present Which Warrant Constricting the Salutary Rule of *Eisen IV*.

If plaintiffs are not permitted to bypass *Eisen IV* by misapplication of the discovery rules, then they ask this Court to so constrict the scope of that decision as to make it inapplicable to this case, with the consequence, we believe, that the rule will be lost in the exceptions.

Plaintiffs contend that there are two factors which justify abandonment of *Eisen IV*—first, the additional costs allegedly attributable to defendants by reason of their opposition to plaintiffs' proposal for broadcast mailing and class redefinition; and second, the alleged fiduciary relationship between defendants and plaintiffs. Neither of these factors warrants the result plaintiffs seek.

1. *Defendants' opposition to a broadcast mailing to a reduced class did not necessitate additional costs.* Defendants opposed the combined proposal primarily because of the damage that was likely to be caused to the Fund and its shareholders by a broadcast mailing (Pet. Br. pp. 32ff). This was a legitimate concern in a period of highly unsettled market conditions when net redemptions by mutual fund shareholders exceeded sales (Pet. Br. pp. 10, 32). It was substantiated by record evidence to the satisfaction of the 3-judge Panel,[13] which correctly noted the substantial

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[13] 558 F.2d at 641; PA-21a.

difference in impact of an official class notice as compared with incidental mention in prospectuses and proxy statements where attention would be focused on entirely different matters. Neither the District Court itself nor the 3-judge Panel in the Circuit Court found plaintiffs' application for a broadcast mailing acceptable in the circumstances here present, a conclusion which was followed in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1099 (5th Cir. 1977).[14]

Broadcast mailing was tied-in to plaintiffs' proposal to reduce the class by some 18,000 shareholders—a proposal which the District Court itself rejected as "arbitrary", saying: "I can simply say that in my view, plaintiffs' proposal would involve an arbitrary reduction in the class." 20 F.R.Serv.2d 1218, 1221; PA-5a-6a.

Thus, the District Court reached the paradoxical conclusion that although plaintiffs' proposal for class reduction was arbitrary and improper, nevertheless defendants were to be penalized because of their opposition to this proposal. The District Court's rationale appears in a single laconic statement:

> "But here the expense is relatively modest and it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." 20 F.R.Serv.2d at 1221; PA-6a.

The comment of the dissent below bears repetition:

> "The determination of the scope of the class was on the merits. We cannot agree that by opposing an improper

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[14] Plaintiffs' speculations as to defendants' motivation in opposing the proposal for broadcast mailing and class reduction are both irrelevant and erroneous. Plaintiffs' misguided "presumption" that defendants were motivated by a desire to obtain the maximum res judicata effect is discussed at Pet. Br. pp. 31-32.

class a defendant thus becomes liable for any increased costs of notification. The class cannot become proper only if the defendant bears the costs of notifying the members. If this is to be the law the opportunities for abuse become obvious."[15] 558 F.2d at 654; PA-54a.

What stands out in the District Court's decision is the absence of any reference to this Court's prior decision in *Eisen IV*, the absence of any discussion as to why the principles of that case might be inapplicable, and above all the characterization of expenses of more than $16,000 (predicated on 1973 prices) for class member identification as "relatively modest" without any cognizance that *Eisen IV* prohibits tailoring the allocation of class notice costs to the pocketbooks of the respective parties. 417 U.S. at 176.[16]

In the circumstances here present, any additional notice costs may not be attributed to defendants.[17]

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[15] *Cf.* Comment, *supra*, 91 Harv. L. Rev. 703, 712 (1978):

"[T]he dissent . . . rightly pointed out that defendants' opposition to an improper class definition should not subject them to increased costs. In addition, under the facts of this particular case, plaintiffs also successfully opposed defendants' attempted class redefinition; *indeed, it was plaintiffs' initial class definition that ultimately was accepted.*" (Emphasis added).

[16] It need hardly be emphasized that the Fund, like all mutual funds, is a "mere shell", a pool of assets that belongs to the individual investors owning fund shares. *Tannenbaum* v. *Zeller*, 552 F.2d 402, 405 (2d Cir. 1977). In this case, the average ownership of the Fund's assets by its 171,000 shareholders was the modest sum of approximately $3,000 per shareholder.

[17] Plaintiffs inaccurately contend that the proposed redefinition of the class would have eliminated some issues raised by defendants' claims against class members who bought fund shares and then redeemed them. In fact, a number of class members, including Taussig (A-106-108), a named plaintiff, redeemed some of their shares and retained some, thus remaining in the class, so that with respect to them there would have been no simplification of issues.

2. *The relationship between the parties does not call for any change in the requirement that plaintiffs shall bear all costs of notice.* Plaintiffs' second main argument for abandoning *Eisen IV* is based largely on the fiduciary relationship between plaintiffs and defendants, which plaintiffs derive from the provisions of the Investment Company Act of 1940, 15 U.S.C. §§80a-1 *et seq.* (Resp. Br. pp. 55-6).

As Justice Frankfurter remarked, ". . . to say that a man is a fiduciary only begins analysis. . . ." *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 85-86 (1943). This note of caution is especially pertinent in the instant case, which is concerned with theoretical errors of judgment in methods of determining the fair value of non-marketable securities and not with corporate insiders seeking to profit at the expense of disadvantaged shareholders.

Corporate managements are, of course, fiduciaries in their dealings with the corporation's security holders and assets. This is true by virtue of a great body of judicial decisions, as well as by a variety of state and federal statutes. See e.g. *United States* v. *Byrum*, 408 U.S. 125, 137-8 (1972); *Pepper* v. *Litton*, 308 U.S. 295, 306-7 (1939); *Zahn* v. *Transamerica Corp.*, 162 F.2d 36, 42-3 (3d Cir. 1947). The fact that corporate managements must observe fiduciary standards in their dealings with the corporation and security holders surely does not render them presumptively guilty, any more than other class action defendants, of the unproved and unsupported accusations of any shareholder who lends his name to a class action complaint, and thereupon demands that any or all the defendants—let alone the defendant corporation—should forthwith finance the prosecution of his lawsuit. If, without more, this fiduciary relationship between corporate management and its shareholders is sufficient to warrant imposing notice costs on defendants, then it is dubious that *Eisen IV* would apply in any but a relatively few class actions. We do not believe that such a result was contemplated by this Court.

Moreover, we do not believe that the fiduciary relationship referred to in the Investment Company Act was intended by Congress to be applicable to notice costs under Rule 23. As this Court has emphasized recently on two occasions, the provisions of the federal securities laws should not be expanded to serve what are at best subsidiary or incidental purposes of the legislation. *Santa Fe Industries Inc.* v. *Green,* 97 S.Ct. 1292, 1303 (1977); *Piper* v. *Chris-Craft Industries, Inc.,* 97 S.Ct. 926, 949 (1977).

The contrived emphasis of the plaintiffs upon the fact that the Fund and its management are subject to the comprehensive legislation embodied in the Investment Company Act would seem to imply that especially because investment companies and their managements are so extensively and thoroughly supervised by the Securities and Exchange Commission under that statute, as well as under the several other securities laws administered by that agency,[18] the plaintiffs are entitled to draw upon the treasury of the Fund to finance their class litigation, from which the Fund can derive no financial benefit whatever.[19]

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[18] "Congress sought to minimize the possibilities of abuse of position by mutual fund managers by means of the Investment Company Act of 1940, 15 U.S.C. §80a-1, *et seq.* This statute expanded the disclosure provisions already applicable to the industry under the Securities Act of 1933, 15 U.S.C. §77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §78a, *et seq.*, and imposed specific requirements as to the structure and operation of mutual funds." *Tannenbaum* v. *Zeller,* 552 F.2d 402, 406 (2d Cir. 1977).

[19] The only cause of action asserted by plaintiffs from which the Fund conceivably might derive financial benefit if plaintiffs prevail fully, is the derivative claim relating to alleged overpayments by the Fund upon redeeming shares and the alleged over-

However, logic and realism require exactly the contrary conclusion. Precisely because the Fund and its management are subject to the intensive regulation of this especially comprehensive statute, under the continuous detailed supervision of one of the nation's leading regulatory agencies, the completely unsubstantiated claims of these plaintiffs should receive far less encouragement and support than in litigations where the defendants are subject to relatively little or no regulation. The Securities and Exchange Commission has not hesitated to institute and prosecute litigations when it has reason to believe that any applicable statute has been violated or that managerial and other fiduciary obligations have been disregarded.[20]

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payments in service fees to the Manager. However, the derivative claim is not related to the class notice costs, the issue here on review. The claim regarding redemptions has been estimated by plaintiffs as possibly aggregating $226,000, that regarding services fees as perhaps $75,000. Record Document, No. 118, p. 11-12. If plaintiffs prevail, however, the Fund stands to lose far more than this by reason of the cross-claims asserted against it by other defendants. (A-66-67; 89-90).

[20] Indeed as prosecutor, the SEC occupies a privileged position over private litigants. Thus Ellsworth, "Disgorgement in Securities Fraud Actions Brought By The SEC," 1977 Duke L. Journal 641, 650 (1977), noted:

> "A good example of the SEC's privileged position is found in *SEC* v. *Petrofunds, Inc.,* where the defendants argued that the accounting and disgorgement of profits requested by the Commission in a suit for alleged fraud on investors in oil and gas drilling properties entitled the defendants to a trial by jury. The disgorgement of profits was identified with the relief that a private litigant might seek under the securities laws or in traditional common law actions. But the court dismissed this argument, saying that disgorgement when sought by the SEC is necessary to effectuate enforcement of the securities laws. A jury trial, therefore, was not required."
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> It may be this "privileged position" that Professor Loss had in mind when he stated in his 1961 treatise: "An even more effective device than the class action would be direct enforcement by the Commission of restitution to the victims of violations of the statutes." 3 L. Loss, *Securities Regulation* (2d ed. 1961) at p. 1824.

Plaintiffs attribute considerable significance to the Supreme Court's footnote reference in *Eisen IV* to *Dolgow* v. *Anderson*,[21] as an example of a possible exception to the *Eisen IV* rule, even though the Court emphasized that "we, of course, express no opinion of the proper allocation of the cost of notice" even in comparable situations. (417 U.S. at 178, n.15).

For good and sufficient reason, the instant case is not comparable with *Dolgow*. First, the test advanced in *Dolgow* for shifting notice costs to the fiduciary defendant required a preliminary hearing and findings of a *prima facie* breach of fiduciary duty and in addition, a finding that the fiduciary was better able to bear the costs. (Pet. Br. pp. 35-6). Any such comparable procedures and finding were, of course, expressly ruled out in *Eisen IV*. Even if they were permissible, the possibility that plaintiffs' complaints, based on alleged violations of SEC Rule 10b-5 and other SEC administered rules and statutes, could survive judicial scrutiny and emerge with a finding of *prima facie* breach of fiduciary duty, have been further sharply reduced, if not obliterated, by at least two of the Supreme Court's recent, highly pertinent decisions: *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), clarifying the test for actionable "deception" under Rule 10b-5, and *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), clarifying the test for actionable "non-disclosure" under other sections and rules.[22]

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[21] 43 F.R.D. 472 (E.D.N.Y. 1968). See Pet. Br. p. 34.

[22] Any intimation that purchases by investment companies of restricted securities was in any way unusual during the relevant 1969-1970 period, is contrary to the facts. The Securities and Exchange Commission has stated that registered investment companies held in excess of $4.2 billion of restricted securities as of the end of 1968 (SEC Investment Company Act Release No. 5847, October 21, 1969.) Moreover, their favor with the investing public was such that a then newly-formed investment company, Fund of

Second, *Dolgow* entailed the most serious type of fraud and breach of fiduciary obligations. There, corporate officers and directors were accused of manipulating the price of the defendant corporation's shares so that they could sell their shares at artificially inflated prices. Here, the alleged misconduct, if any, consisted essentially of errors of judgment as to methods of evaluating the fair value of restricted securities and an alleged failure to describe adequately in the Fund's prospectuses the nature of such investments and methods of valuation.

The other theoretical exception in *Eisen IV* that the Court mentioned expressly related to pre-existing "fiduciary duties . . . *as in a shareholder derivative suit*" (417 U.S. at 178). (Emphasis supplied.) In derivative suits, the corporation might at least stand to realize large and meaningful financial benefits if the shareholder plaintiffs were ultimately upheld. Here, the Fund will recover nothing if the plaintiff class recovers on the class claims (Pet. Br. pp. 34-5) and may instead be liable on cross claims to the unsuccessful defendants (Pet. Br. p. 6). See p. 20, *infra*.

Furthermore, this Court's discussion of a possible exception to the *Eisen IV* rule where fiduciaries were involved, referred to the existence of fiduciary duties between "the plaintiff and the defendant"—i.e. where there was a controversy between the two. However, the Fund is not a party to the class action claims, for no recovery is sought by plaintiffs from the Fund in the class action (Pet. Br. p. 35).

Plaintiffs seek to avoid the implications of these facts by pointing out (Resp. Br. p. 57) that although the Fund

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Letters, Inc., raised $55 million of capital in a public offering in 1968 for an investment portfolio to consist predominantly of restricted securities. *Investment Companies*, L. T. Wessman, ed., Arthur Wiesenberger Services (29th ed. 1969), p. 403.

is not a party to and has no controversy with plaintiffs in the class action, it does have an interest in the outcome by reason of the cross claims contingently asserted by the other defendants. These are to the effect that if defendants are found liable to the class by reason of overvaluations of restricted securities, then the Fund is liable to them to the extent it received excess funds from the class by reason of such overvaluation.[23] However, this argument further emphasizes the inequity of requiring the Fund to pay the notice costs here involved. If plaintiffs are unsuccessful, the Fund will have financed the suit and may or may not obtain reimbursement. If plaintiffs are successful, the Fund will receive no portion of the class recovery. On the contrary, by reason of the cross claims, the Fund may be liable to the other defendants to the extent that it was unjustly enriched by overpayments from the plaintiff class.

It is indeed evident that the only financial interest of the Fund in this litigation is on a "heads you win, tails I lose" basis. This scarcely justifies requiring the Fund to pay out the moneys of its shareholders in order to exempt the plaintiffs from the "usual rule" enunciated by this Court, that "the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Eisen IV*, 417 U.S. at 179.

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[23] A-67, A-89.

CONCLUSION

In view of the foregoing and for the reasons set forth in Petitioners' Brief, the judgment of the United States Court of Appeals for the Second Circuit should be reversed, with directions to vacate the order of the District Court insofar as it relates to the payment of the cost of identification of class members, and to require plaintiffs to bear these costs if they choose to continue the class action.

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